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Within recent years there has sprung up in the law a new form of contention, founded upon a violation of what is termed "the right of privacy." The action to secure such right is, as yet, infrequent and unusual and depends for its support upon an application of certain principles which are themselves not very well defined or their boundaries very well recognized or plainly laid down.

The Court of Appeals of New York recently passed upon a question of this character in the case of Schuyler v. Curtis, 42 N. E. Rep. 24. The alleged violation of the right of privacy, in that case, consisted of an attempt on the part of certain reputable women, without the sanction of plaintiff or other immediate members of the family, to do honor to the memory of a woman who was the aunt of the plaintiff, and who, at the time of the commencement of this action, had been dead for 14 years. A statue of a most costly and meritorious kind, to be made out of appropriate material and by an artist of the first rank, was contemplated as the means of doing this honor to the memory of the deceased relative of the plaintiff. It may, perhaps, be somewhat difficult for the ordinary mind to perceive any reason for the plaintiff's distress arising out of this contemplated action by women of respectability, who are desirous of honoring the memory of a woman whom they regarded in life as a friend and benefactor of their sex.

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Objection was, however, made by the relatives of the deceased woman to the carrying out of the project. The grounds of their objections were: (1) The persons concerned in getting up the proposed statue were not the friends of the plaintiff's deceased aunt, and, as plaintiff alleged, did not know her. (2) They were proceeding with their plan without consulting with the plaintiff or other immediate members of the family, and without their consent to the making of any statue. (3) The circulars issued by or in behalf of the defendants contained a statement that Mrs. Schuyler was the founder of, or the first woman in, the enterprise for securing the home of Washington, and that this statement was inaccurate, because a prominent woman in South Carolina was in fact such founder, and justly entitled to the honor arising therefrom. This mistake, it was asserted, had caused adverse comment in the newspapers as to the attitude of the family of the plaintiff in permitting such a claim to be made when they must have known it was without foundation. (4) It was disagreeable to the plaintiff because the making of such a statue would have been disagreeable and obnoxious to his aunt, were she living. She had, as plaintiff said, a great dislike to have her name brought into public notoriety of any kind, as she was a singularly sensitive woman and of a very retiring nature, anxious to keep her name from the public prints or newspapers. (5) That plaintiff's aunt had not been personally acquainted with Susan B. Anthony, a statue of whom was also to be made and exhibited, and he was quite sure she had not sympathized with or approved the position taken by Miss Anthony upon the question of the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs. Schuyler joined with principles of which she did not approve.

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The court disposed of most of these objections with few words, only the fourth being considered worthy of lengthy consideration, and this was overruled. While recognizing what is known as the "right of privacy," and conceding that an individual may properly call upon a court of equity to enjoin the doing of an act, which is a violation of his right of privacy, and which causes mental distress and injury, the court held that such right does not descend to a relative or legal representative. "It is not a question," says Judge Peckham, who delivered the opinion, "of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us of all rights, in the legal sense of that term; and when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living

which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character or memory of the deceased. A woman like Mrs. Schuyler may very well, in her lifetime, have been most strongly averse to any public notice, even if it were of a most flattering nature, regarding her own works or position. She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her. It is wholly incredible that any individual could dwell with feelings of distress or anguish upon the thought that, after his death, those whose welfare he had toiled for in life would inaugurate a project to erect a statue in token of their appreciation of his efforts, and in honor of his memory."

It is quite clear, upon a study of this decision, that the fact that the purpose of the defendants was to do honor to the memory of the deceased and that purpose was to be carried out in an appropriate manner, by reputable individuals and for worthy ends, was the controlling factor in the determination of the case. Had the fact been otherwise, the right of privacy of the living relatives, as recognized by the court, would have been invaded.

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Gray, J., dissented from the conclusions of the court, filing an opinion arguing strongly for the general right of privacy. As the representative of Mrs. Schuyler's immediate living relatives, he contended that it was competent for him to maintain an action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. "I cannot see," he says, "why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person. If it is a property right with reference to the publication of a catalogue of private etchings, and entitled to be protected against invasion, as Lord Cottenham held in Prince Albert v. Strange, 1 Macn. & G. 25, 47, why is it not such with reference to name and reputation? We have some illustrations of the exercise by courts of equity of their peculiar powers in cases which have been cited, in principle not unlike this, where the publication of one's letters and the sale of photographic portraits have been enjoined, besides the case of the publication of the catalogue referred to. See Gee v. Pritchard, 2 Swanst. 402; Prince Albert v. Strange, 2 De Gex & S. 652; Pollard v. Photographic Co., 40 Ch. Div. 345; and Woolsey v. Judd, 4 Duer, 379. These decisions are authority for the doctrine that equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that the legal right which is to be protected shall be one cognizable as property. It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporeal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights, and their violation in definite ways, for which an action at law cannot afford plain and adequate redress. That is the case here."

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## NOTES OF RECENT DECISIONS.

MALICIOUS INTERFERENCE WITH CONTRACT.—In Morgan v. Andrews (Mich.), 64 N. W. Rep. 869, it appeared that plaintiff, an inventor and machinist, entered into a contract with a firm to design and construct for them a machine which would produce certain results. Defendant was employed by the firm as their manager at their factory, and the tests to be made of the machine, in order to discover whether or not it satisfied the requirements of the contract, were to be made under his supervision. Maliciously, and without good cause, he persuaded the firm to reject the machine, which they would have accepted but for his conduct. It was held that defendant was liable. The court said that the case of Chipley v. Atkinson, 23 Fla. 206, 1 South.

Rep. 934, is directly in point. The plaintiff there was a superintendent in a brick manufactory, and alleged that his discharge was procured by the malicious interference of the defendant. It was held that, although no action lay against the employer for his discharge, yet plaintiff might recover against a third person who had maliciously procured his discharge. It was said by the court: "Merely to persuade a person to break his contract may not be wrongful in law; still, if the persuasion be used for an indirect purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff, it is a malicious act, which, in law and fact, is wrongful, and therefore actionable." See, also, Rice v. Manley, 66 N. Y. 82; Benton v. Pratt, 2 Wend. 385. In Rice v. Manley, one Stebbins agreed verbally to sell to Rice a large quantity of cheese. The contract was not enforceable, because within the statute of frauds. Manley induced Stebbins to believe that Rice did not want the cheese, and himself purchased it from Stebbins, who would otherwise have delivered it to Rice, as agreed. It was held that Manley was liable in damages to Rice for his fraudulent interference with the contract, notwithstanding Stebbins was not in any wise liable to Rice. So in Benton v. Pratt, the contract was void under the statute of frauds; yet the court held that a recovery could be had against a third person who maliciously interfered with the contract for his own gain or profit. Of course, this rule would not prevail where the party sought to be charged in damages was acting in lawful exercise of some distinct right, for the *quo animo* constitutes a large part of the gist of the action; but here the declaration charges both malice and fraud, and, as expressed by Pollock in his work on Torts, "there must be a wrongful intent to do harm to the plaintiff before the right of action for procuring the breach of the contract can be established."

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FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP — CORPORATION OF SEVERAL STATES.—In Missouri Pac. Ry. Co. v. Meeh, 69 Fed. Rep. 753, decided by the United States Circuit Court of Appeals, Eighth Circuit, it was held that a corporation formed by the consolidation of corporations of three different States, pursuant to the laws thereof, is, within each of such States, a corporation of that State; and the Federal courts there held have no jurisdiction of a suit against it by a citizen of the State, on the ground of diverse citizenship. The court said in part:

Assuming, then, that there are three distinct legal entities known as the Missouri Pacific Railway Company—one a corporation of Missouri, another a corporation of Kansas, and another a corporation of Nebraska— we turn to consider whether, on the state of facts disclosed by this record, the Circuit Court of the United States for the District of Kansas had jurisdiction of the case at bar. We think that this question was practically decided in the cases heretofore cited. Thus, in Railway Co. v. Whitton, 13 Wall. 270, 283 the plaintiff, who was a citizen of Illinois, sued the railway company, which had been incorporated by the States of Wisconsin and Illinois, in the courts of Wisconsin, for a negligent act committed in Wisconsin. Subsequently the plaintiff removed the case to the Circuit Court of the United States for the District of Wisconsin, and the question arose whether the latter court had jurisdiction. It will be noticed that in the paragraph of the opinion above quoted Mr. Justice Field said: "The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its *status* or citizenship may be elsewhere."

So, in the case of Railroad Co. v. Wheeler, 1 Black, 286, the plaintiff company described itself as a corporation created and existing under the laws of the States of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler, describing him as a citizen of Indiana, in the Circuit Court of the United States for the District of Indiana; but the Supreme Court held that the action could not be maintained, saying in substance that in the character in which the company had sued, as a corporation of Indiana and Ohio, it could not maintain a suit against a citizen of Ohio or Indiana in a Circuit Court of the United States. The decisions in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 365, 10 Sup. Ct. Rep. 1004, and in Muller v. Dows, 94 U. S. 444, 447, do not conflict with the prior decisions of the Supreme Court of the United States, for in the former of these cases the New Hampshire corporation, the Nashua Railroad, which had been created a corporation of the State of Massachusetts, sued the Massachusetts corporation in the Circuit Court of the United States for the District of Massachusetts, to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities; and it was held that the suit could be be maintained. So, in Muller v. Dows, 94 U. S. 444, two citizens of New York and a citizen of Missouri united in bringing a suit against two railroad corporations in the District of Iowa. Both of the defendant corporations were incorporated under the laws of Iowa, but one of them, by consolidation proceedings, had also become a corporation of the State of Missouri. This fact was supposed to destroy the jurisdiction of the court. But the Supreme Court held otherwise, saying that the consolidated company "in the State of Iowa [where sued] · · · was an Iowa corporation existing under the laws of that State alone." The rule, we think, that may fairly be extracted from these cases, is this. That whenever a corporation of one State, by legislative sanction, becomes also a corporation of another State, either by the process of consoli-

dation or otherwise, whatever acts it subsequently does or performs in the latter State it does and performs as a domestic, and not as a foreign corporation. It derives all of its powers to act as a corporation in the State of its adoption from local laws. If it is there sued for an act done within the State, it is sued and must answer as a domestic, and not as a foreign, corporation. The same thought was expressed by Mr. Justice Breese in the passage quoted from Quincy Bridge Co. v. Adams Co., 85 Ill. 615, when he said: "The only possible *status* of a company acting under charters from two States is that it is an association incorporated in and by each of the States; and, when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only, the legislation of the other State having no operation beyond its territorial limits.

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FEDERAL COURTS—UNITED STATES SUPREME COURT—APPEAL FROM STATE COURT—CONSTITUTIONAL LAW.—The Supreme Court of the United States decides in Central Land Co. v. Laidley that the appellate jurisdiction of the Supreme Court can be invoked upon writ of error to a State court, on the ground that the obligation of a contract has been impaired, only when an act of the legislature alleged to be repugnant to a constitutional provision has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court; and that when the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the meaning of Const. U. S. Amendment 14.

Mr. Justice Gray says:

The questions upon the merits of this case, discussed at length by counsel, were whether the Supreme Court of Appeals of West Virginia rightly construed the provision of the Code of that State of 1868, which was, and was admitted to be, in all material respects, a re-enactment of the corresponding provision of the Code of Virginia of 1860, prescribing the form of acknowledgment by a married woman of a deed of real estate; and where the court below gave a construction of that provision less favorable to the validity of such a deed than had been given to it by its own earlier decisions, and by the highest court of Virginia before the creation of the State of West Virginia. Those questions are not free from difficulty; and this court, before undertaking to pass upon them, must be satisfied that it has jurisdiction to do so.

The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that by the decision of the Supreme Court of Appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error has been impaired, and the plaintiff in error has been deprived of its property without due process of law.

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of opinion that they present no federal question.

In order to come within the provisions of the constitution of the United States which declares that no State shall pass any law impairing the obligation of contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon writ of error to a State court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the State court to be valid, and not when an act admitted to be valid, has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the State court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the State has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847: "It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary." Bank v. Buckingham's Ex'rs, 5 How. 317, 343; Lawler v. Walker, 14 How. 149, 154.

It was said by Mr. Justice Miller, in delivering a later judgment of this court: "We are not authorized by the judiciary act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." Knox v. Bank, 12 Wall. 379, 383.

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: "The State court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by State legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the State constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. 916.

Many other decisions of this court to the same effect

are cited in that case. See, also, New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 30, 8 Sup. Ct. 741; St. Paul, M. & M. Ry. Co. v. Todd Co., 142 U. S. 282, 12 Sup. Ct. Rep. 281; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. Rep. 958; Wood v. Brady, 150 U. S. 18, 14 Sup. Ct. Rep. 6.

The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a State court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in Louisiana v. Pilsbury, 105 U. S. 278, in Insurance Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681, and in Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486; or else the writ of error was to a Circuit Court of the United States, bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest courts of the State, as in Gelpcke v. City of Dubuque, 1 Wall. 175, 205, Olcott v. Supervisors, 16 Wall, 678, 690, Douglass v. Pike County, 101 U. S. 677, 686, Anderson v. Santa Anna Tp., 116 U. S. 356, 361, 6 Sup. Ct. Rep. 413, and other cases cited in Louisiana v. Pilsbury, 105 U. S. 278, 295.

The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the State court, was reviewed on the merits, and reversed by this court, for misconstruction of the constitution of Iowa. Gelpcke v. City of Dubuque, 1 Wall. 175, 206. But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the State court. Railroad Co. v. McClure, 10 Wall. 511, 515.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the constitution of the United States. Walker v. Sauvinet, 92 U. S. 90; Head v. Amoskeag Co., 113 U. S. 9, 26, 5 Sup. Ct. Rep. 411; Morley v. Railway Co., 146 U. S. 162, 171, 13 Sup. Ct. Rep. 54; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. Rep. 727.

This court, therefore, has no authority to decide the main questions argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect and erroneously, overruled the prior decision of that court and of the Supreme Court of Appeals of Virginia before West Virginia became a separate State; and the writ of error must be dismissed for want of jurisdiction.

LEGISLATURE — ELECTION OF OFFICERS — QUORUM.—The Supreme Court of North Carolina, in State *ex rel.* v. Ellington, 23 S. E. Rep. 250, determined an interesting question of parliamentary law, the holding being that though the roll call of the house of representatives showed that a quorum assembled for the transaction of business, but the roll call on the election of an officer disclosed that less than a quorum voted, it will not be presumed that a quorum was present at such election, and that the general rule is that a majority of the members of a legislative body will constitute a quorum, in the absence of a constitutional provision fixing the number. The court says:

Prior to the 13th day of March, 1895, the board of trustees of the State library, under existing law, elected to and filled this office. On that day (March 13, 1895) the legislature passed and ratified an act repealing the law authorizing the board of trustees to elect, and provided for the election of this officer by the legislature. And on the same day, to-wit, the 13th day of March, 1890, the plaintiff claims that he was duly elected State librarian by the legislature pursuant to said act. And this not being a bill enacted into a law ratified and signed by the presiding officers of senate and house, and deposited in the office of secretary of state, which then becomes the evidence of its passage (Carr v. Coke, 116 N.C. 223, 22 S. E. 16; U. S. v. Ballin, 144 U. S. 4, 12 Sup. Ct. Rec. 507), it became necessary for plaintiff to introduce the record of the legislature for the purpose of proving his election and right to the office he was claiming. These records show than on the morning of the 13th of March there was a roll call of the house, a quorum answered, and the house proceeded to business. They also show that there was a proposition in both branches of the assembly (senate and house) to go into the election of State librarian; that these motions prevailed, and both the president of the senate and the speaker of the house appointed two tellers, each, to take this vote. And they reported that in the senate there were 26 votes cast, 25 being for the plaintiff and 1 against; and in the house there were 48 votes cast for the plaintiff, and none against him. It is admitted by plaintiff that there must be a quorum present to do business, or in this case, to elect the plaintiff to the office he claims. But he claims that it appearing there was a quorum present that morning, and it not appearing there had been an adjournment since, it will be presumed that there continued to be a quorum present. We think this is undoubtedly true,—that the quorum will be presumed until it shall appear there is not one. Cush. Elect. (2d Ed.) 369. This is usually made to appear by what is called a "division;" and this is usually had after a vote by yeas and nays, when the presiding officer announces the vote and some opposing member doubts the correctness of the announcement and demands a division,—a call of the body. *Id.* § 1798. And strictly speaking this is what is called a "division." Cush. Parl. Law, § 1814. The original purpose of a division was for the purpose of ascertaining who voted "Aye" and who voted "No," and it was effected in this way: the ayes occupied one part of the hall and the noes another, and there remained until the tellers appointed counted them. In this way it came

to be called a "division." In more modern assemblies it is more usually effected by a call of the house,—a yea or nay vote when each member's name is called. Cush. Elect. § 1615. This mode is used for two purposes,—one to determine on which side the majority voted; and also for the purpose of determining whether there is a quorum present. U. S. v. Ballin, *supra*. In this case it was no *viva voce* vote preceeding the roll call. With this exception, there seems to have been all done that is usually done before a division, which is now usually had by a call of the roll. Cush. Elect. § 1615. Why this was not done, we do not know. Const. U. S. art. 1, § 5, requires that in all elections under this constitution the vote shall be *viva voce*. And if this section applies to this election it does not mean a roll call, but a vote by voice, and not by ballot. And if the vote had been taken that way, and announced by the presiding officers in favor of plaintiff, and no division called for, the presumption contended for by plaintiff would have availed him. But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him, —a modern division,—we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time. Cooley, Const. Lim. p. 168; U. S. v. Ballin, *supra*. It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know. But it seems to be conceded that the speaker of the house of representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting, to make a quorum, until the house adopted a rule to that effect. He then counted non-voting members present to make up a quorum, and the Supreme Court of the United States sustains his action. U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. Rep. 507. So may the legislature of North Carolina adopt a similar rule, as there is nothing in the constitution to prevent it doing so. But it has not adopted such a rule, and under the authority of U. S. v. Ballin, *supra*, we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. This brings us to the consideration of what is a quorum. They are of two kinds,—one fixed by the constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. But, where the quorum is not fixed by the constitution or the power that creates the body, the general rule is that a quorum is a majority of all the members (Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. Rep. 271; Cush. Elect. § 247; U. S. v. Ballin, *supra*), and a majority of this majority may legislate and do the work of the whole. There is no constitutional quorum; that is, a number prescribed by our constitution that shall constitute a quorum. We therefore fall under the general rule applying to legislative bodies. U. S. v. Ballin, *supra*. The legislature of North Carolina consists of 170 members,—50 in the senate and 120 in the house. Therefore it takes the presence of 26 senators to constitute a quorum in the senate, and 61 members of the house. In this election 26 senators voted, which was a majority of that body, and a quorum. But in the house there but 48 members who voted. This we see was less than a quorum. For this reason plaintiff has failed to establish his right to the office.

## SERVICES WHOSE PERFORMANCE IS EXCUSED BY SICKNESS OR LIKE DISABILITY.

*Classification of Services coming within Doctrine or Otherwise.*—The familiar doctrine concerning impossibility of performance of contracts, whereby sickness, death or physical or mental disability excuses a failure to perform the contract,[1] is well known to apply only where the contract is for services such as involve skill and could not be performed by another. The vitally and practically important question which then arises, and which will be discussed in the present article is, what services come within this category? The answers given by the courts have been so conflicting as to render highly desirable an attempt to clarify them and suggest the solution of the inquiry. These answers may be reduced to the following propositions: 1. Services of an artistic cast, like those of a theatrical performer, are typical of the class of services which come within the doctrine. 2. Hired manual labor for a given period has apparently been quite extensively viewed as coming within the doctrine. 3. Contracts to marry have been sometimes held not such that sickness would excuse performance, though death, of course, would have that effect. 4. Contracts which can be performed by the representatives of a deceased person do not come within the doctrine.

*Theatrical Contracts.*—Perhaps the most common class of agreements to which the doctrine under consideration is applicable, is found in theatrical contracts. The sickness of the famous German tenor Wachtel, for example, has been held[2] to excuse the failure

[1] See Spalding v. Rosa, 71 N. Y. 40, 44, 27 Am. Rep. 7, 10; Wolfe v. Howes, 20 N. Y. 197, 200 202, 75 Am. Dec. 388; Fisher v. Monroe, 16 Daly, 461, 464; People v. Manning, 8 Cowen, 297, 298-99; Billings' Appeal, 106 Pa. St. 558, 560; Scully v. Kirkpatrick, 79 Pa. St. 324, 331-33, 21 Am. Rep. 62, 63-65; Johnson v. Walker, 155 Mass. 253, 254-55, 31 Am. St. Rep. 550-51; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Stewart v. Loring, 5 Allen, 306, 81 Am. Dec. 747-48; Yerrington v. Greene, 7 R. I. 589, 593-95, 84 Am. Dec. 578, 579-81; Knight v. Bean, 22 Me. 531, 534; Siler v. Gray, 86 N. Car. 566, 569; Jennings v. Lyons, 39 Wis. 553, 557, 20 Am. Rep. 57, 59; Janin v. Browne, 59 Cal. 37, 44; Boast v. Firth, Law R., 4 Com. P. 1, or 38 Law J. Com. P. 1; Pollock, C. B. in dissenting opinion in Hall v. Wright, El. Bl. & E. 746, at pp. 793-94; Robinson v. Davison, L. R., 6 Ex. 269, 274, 277, 278. Impossibility of performance of contracts in general is discussed in 12 Cent. L. J. 4.

[2] In Spalding v. Rosa, 71 N. Y. 40, 43, 44, 27 Am. Rep. 7, 9-10.

to furnish an opera troupe of which he was the leading attraction. Similar effect has been given to the illness of a wife for whom the husband contracted that she should play the piano at a concert.[3] Of course in cases of this and like character, the peculiar nature of the services, such as makes it ordinarily difficult to supply the place of the disabled performer, is obvious, and significantly illustrates the general doctrine.

*Contracts for Hired Manual Labor for a Particular Period.*—Contracts for hired manual labor for a particular period seem to be not infrequently placed by the courts in the category of contracts for personal services of such a character that sickness or death will excuse their performance. Thus in one leading American case,[4] it is said that a contract of this sort is "for the personal services of the individual who is hired, and cannot be performed by the agency of another person." In this important respect the contract is deemed peculiar, and "different from a contract by which one agrees to do a particular piece of work, as, for instance, to build a house, which may be performed through another person." In another such case[5] it is laid down that in a contract "for the performance of personal manual labor, requiring health and strength," the contract "must be understood to be subject to the implied condition that health and strength remain."[6]

[3] Robinson v. Davison, Law R., 6 Ex. 269, 274 *et seq.* See, also, as to the failure of a skilled operatic singer to perform in a new piece through serious illness as going to the essence of the contract and justifying dismissal by the manager. Pooussard v. Spiers, Law R., 1 Q. B. D. 410, 414 415, 17 Moak's Eng. Rep. 93, 97, 98.

[4] Ryan v. Dayton, 25 Conn. 188, 193, 65 Am. Dec. 560, 563.

[5] Dickey v. Linscott, 20 Me. 453, 455-56, 37 Am. Dec. 66, 67. See, also, a similar statement to the first part of that next quoted in the text, in Fenton v. Clark, 11 Vt. 557, at p. 563.

[6] Again, in a comparatively recent leading case much later than either of these, Judge Finch of the New York Court of Appeals, while admitting that most of the cases holding that the death of a person whom the law designates as a "servant" dissolves the contract are marked by the circumstance that the services belonged to the class of skilled labor, where the impossibility of a substituted service by a representative of the servant is very apparent, denies that these cases depend on that characteristic. He insists that even as respects common labor like that on a farm the servant's character, habits, capacity, industry and temper, all enter into the contract which the master makes and affect that contract, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. Lacy v. Getman, 119 N. Y. 109, 114-15, 16 Am. St. Rep. 806, 808-9. Even the idea that a contract with a writer, artist, physician or lawyer, would die with the party regardless of the question whether he was the most indifferent or the most eminent in his profession or vocation, is advanced in Shultz v. Johnson's Admr., 5 B. Mon. 497, 501.

Often the like view appears to be assumed, or at any rate, nothing is said of any special skill involved.[7] Sometimes, however, the reference made to the personal services of "skilled artists, artizans and mechanics,"[8] would seem to exclude the idea of unskilled labor as coming within the doctrine under consideration.[9] In some cases involving death, furthermore, a position adverse to that which would exclude the criterion of skill has been taken. These authorities, while conceding that the death of the master, as well as of the servant, dissolves the contract, appear still to leave the question of the liability of the representatives of the master dependent, as in other cases, upon the purely personal character of the contract as measured by the requirement of special skill or knowledge.[10] This certainly seems the more consistent view; and it is submitted that even the acknowledged ability of the judge who so plausibly sustained the opposite view in a case mentioned in one of the preceding notes,[11] can hardly justify a departure from the more reasonable criterion. That criterion itself gives ample room for flexibility of interpretation; and it would seem better that in a particular case there should be a strained construction in determining whether the labor is skilled or unskilled, than that such a fundamental test should be discarded altogether.

*Contracts to Marry.*—It appears to be fairly settled or admitted that a party will be ex-

[7] Personal services in drilling a well, for example have been held to come within the rule excusing performance on account of sickness. Green v. Gilbert, 21 Wis. 395, 400. See, also, for a like view as to farm labor, Fahy v. North, 19 Barb. 341, 342.

[8] Like that made in Fisher v. Monroe, 16 Daly, 461, at p. 466.

[9] The distinction is fully recognized, and stress laid upon the skill and experience required for the art of pot-making, and the impossibility of a common laborer supplying the place of one so skilled, in Wolfe v. Howes, 20 N. Y. 197, 199, 75 Am. Dec. 388.

[10] This is true of Babcock v. Goodrich, 3 How. Pr. (N. S.) 52, 54, 57, where the employee was engaged to cut garments for a merchant tailor. A like view appears to be assumed in the case of a farm bailiff in Farrow v. Wilson, 4 Com. P. 744, though in the other case just cited this seems to be viewed as a case of principal and agent and so of a different character.

[11] Finch, J., in Lacy v. Getman, 119 N. Y. 109 or 16 Am. St. Rep. 806.

cused from performing a promise to marry, and relieved from liability thereon, not only because of the physical or mental disability of the other party, arising or discovered after the promise,[12] but also because of the promising party's own incurable impotence,[13] or, presumably, because of the insanity of such party[14] arising or subsisting after the promise. The reasoning upon which these conclusions may be consistently supported, though not always set forth by the courts, is that there can be no duty to keep the promise, or liability for breaking it, in case of the incapacity of the opposite party, or of the promising party, to enter into the contract of marriage or fulfill the functions it involves. But can the promising party set up any other disability, like sickness or disease of an aggravated character, as a defense to a breach of promise suit? The same reasoning would seem to be applicable. Yet in regard to this question there has been considerable divergence of view. On the one hand a negative answer has been given by a majority of the judges in a well-known English case[15] where the man sued was troubled by occasional bleeding at the lungs which rendered him incapable of marriage without great danger to life. But the case has been much discredited, and is sometimes deemed to have been materially affected by the fact that notice of the cause of failure to perform was not given to the opposite party. And American cases have favored a different view. Indeed a directly opposite position has been taken n two later leading decisions in this country.[16] They substantially hold that marriage is not to be treated like any other contract, such as a bargain making a sale of personal property, where damages are given as a substitute when the subject-matter cannot be delivered. They consider that the contract of marriage is subject to implied conditions peculiar to itself, such as preclude a duty to perform, or liability for not doing so, on the part of a person afflicted with a venereal disease deemed incurable or pronounced an objection to marriage. They insist that a party should surely not be responsible in damages for not contracting marriage under circumstances which would be productive of intense misery instead of mutual comfort, and where the marriage would be a crime against society, which has an interest in the matter, as well as against the individuals concerned and these who come after them. One of these cases[17] further assigns the more general reason that the doctrine which excuses performance in cases of impossibility to fulfill the main part of a contract, applies to cases where the party has become unfit to carry out the chief objects of marriage. A view which may be termed intermediate is adopted by some American cases. They hold that in an action for breach of promise, the defendant may show in mitigation of damages that he was afflicted with an incurable disease at the time of the breach.[18] The conclusions reached in the more radical American cases seem, however, in every way reasonable, whether considered on grounds of justice and considerations of public policy, or by viewing marriage more especially as a *status*, or regarding it as based on contract and involving duties and liabilities which are contractual in their nature. From the last point of view, the considerations which govern would seem to be like those regulating contracts of a personal nature involving skilled services such as could not be performed by another. As for any liability imposed by law outside of that arising from the contract, it is difficult to see how there could be any such responsibility except in cases where there had been culpability in contracting the disease, or

[12] See Atchison v. Baker, Peak Ad. Cas. 103, 104; Gring v. Lerch, 112 Pa. St. 244, 249, 56 Am. Rep. 314, 315-17; Kantzler v. Grant, 2 Ill. App. 236, 238; also, remark of Williams, J., in Hall v. Wright, El. Bl. & E. 765, at pp. 791-92.

[13] See Gulick v. Gulick, 41 N. J. L. 13-15; Pollock, C. B., dissenting, in Hall v. Wright, El. Bl. & E. 765, at p. 795. Compare, however, 1 Bish. Marr. Div. & Sep. § 204.

[14] See remark of Lord Campbell, C. J., in the decision of the lower court in Hall v. Wright, El. Bl. & E. 746, at page 759. But compare Baker v. Cartright, 10 Com. B. (N. S.) 124, 127, or 100 Eng. Com. L. 124, 127.

[15] Hall v. Wright, El. Bl. & E. 765, reversing same case at p. 746. See comments on this case in Robinson v. Davison, Law R. 6 Ex. 269 at pp. 274, 277; in remarks of Montague Smith, J., in Boast v. Firth, Law R. 4 Com. P. 1, or 38 Law J. Com. P. 1, 2, 3; and in Allen v. Baker, 86 N. Car. 91 at pp. 96-97, 41 Am. Rep. 444, 446-47.

[16] Allen v. Baker, 86 N. Car. 91, 95-98, 41 Am. Rep. 444, 445-48; Shackleford v. Hamilton, 19 S. W. Rep. (Ky.) 5, noted 34 Cent. L. J. 466.

[17] Allen v. Baker, just cited.

[18] Mabin v. Webster, 129 Ind. 430, 432-35, 28 Am. St. Rep. 199, 200-202; Sprague v. Craig, 51 Ill. 288, 292. For a like view as to the sickness of the opposite party, see Walker v. Johnson, 6 Ind. App. 600, 605, or 33 N. E. Rep. 267, 269; Goddard v. Westcott, 82 Mich. 180, 186-87.

wrong in concealing it such as might give ground for an action of deceit.

*Contracts which Need not be Performed by Representatives of Deceased Persons.*—The discussion of the question: "What contracts need not be performed by the representatives of deceased psrsons?" which is perhaps most frequently considered in dealing with the estates of such persons, cannot be fully pursued here without unduly extending the limits of the present article.[19] Reference must be made, however, to the existence of a familiar exception to the general rule that the contracts of the deceased must be performed by his executors or personal representatives,[20] arising when the nature of the contract is such as to admit of personal performance only, or as to imply that the contract is to be operative during the continuance of personal relations only.[21] Noticeable illustrations of the exception,[22] though they are not always placed on the ground that they are such, occur on the death of a party to a contract of marriage before the time fixed for the marriage by the contract;[23] the death of a master or apprentice before the expiration of the term of service limited in the indentures; the death of an employer of a salesman or other clerk;[24] the death of attorneys, physicians or teachers contracting to render services appropriate to their professions;[25] or the death of an author or artist before the time contracted for the finishing and delivery of a book, picture, statue or other work of art. An undertaking to promote in every way the introduction of a patent elevator and conveyer, has been recently held to come in the same category in Marvel v. Philips (Mass.), 40 Cent. L. J. 104. But here, as in regard to disability in general, there is a conflict of authority upon the question whether the element of personal skill or taste must form an important feature of the contract to bring it within the exception. Some of the cases hold that such an element must be present as a factor of the contract.[26] Others take an opposite view.[27] Both classes of cases lay stress on the criterion of the intention of the parties.[28] It seems most reasonable, however, to adopt a view which may be thus formulated: Whether the contract be such as the representatives of a deceased person are bound to perform and free to enforce, depends primarily on the intention of the parties. Material factors in determining this intention may be the subject-matter of the contract, and the occupations of the parties concerned with the contract. The skill of the contracting parties, if not an essential feature of the contract, may at least be a

[19] The effect of death upon contracts may be generally gathered from such authorities as Drummond v. Crane, 159 Mass. 577, 578-79, 38 Am. St. Rep. 460, 461-62; Martin v. Hunt, 1 Allen, 418, 419; Yerrington v. Greene, 7 R. I. 589, 593, 594-95, 84 Am. Dec. 578, 579, 580-81; Chamberlain v. Dunlop, 146 N. Y. 45, 52 53, 22 Am. St. Rep. 807, 810-11, and note, 811-15; Kernochan v. Murray, 111 N. Y. 306, 308, 7 Am. St. Rep. 744, 745; Stumpf's Appeal, 116 Pa. St. 33, 38-39; White's Exe'rs v. Commonwealth, 39 Pa. St. 167, 176; McClure's Exe'rs v. Gamble, 27 Pa. St. 288, 290; Phipps v. Jones, 20 Pa. St. 260, 263, 59 Am. Dec. 708, 710; Siler v. Gray, 86 N. Car. 566, 570; McGill's Creditors v. McGill's Admr., 2 Met. (Ky.) 258, 262; Hawkins v. Ball's Admr., 18 B. Mon. 816, 820, 68 Am. Dec. 755, 757; Smith v. Brennan, 62 Mich. 349, 354, 4 Am. St. Rep. 867, 869; Janin v. Browne, 59 Cal. 37, 44; Wentworth v. Cock, 10 Ad. & E. 42, 46.

[20] See fuller statement of the rule in Stumpf's Appeal, 116 Pa. St. 33, 38.

[21] See the opinion by Andrews, J., in Kernochan v. Murray, 111 N. Y. 306, at p. 308 or 7 Am. St. Rep. 744 at p. 745. This exception has been recently considered in Marvel v. Philips (Mass.), 40 Cent. L. J. 104.

[22] See enumerations in Stumpf's Appeal, 116 Pa. St. 33, 38-39; Janin v. Browne, 59 Cal. 37, 44; Siler v. Gray, 86 N. Car. 566, 570.

[23] See as to this entire subject, Flint v. Gilpin, 29 W. Va. 740, 741-43; Grubb's Adm'r v. Sult, 32 Gratt. 203, 204, 208, 34 Am. Rep. 765, 768; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Stebbins v. Palmer, 1 Pick. 71, 78-79, 11 Am. Dec. 146, 147-48; Smith v. Sherman, 4 Cush. 408, 412-14; Kelley v. Riley, 106 Mass. 339, 341; Chase v. Fitz, 132 Mass. 359, 363-66; Lattimore v. Simmons, 13 Serg. & R. 183, 184-86; Finlay v. Chirney, Law R., 20 Q. B. D. 494, 497-99, 501, 507-8; Chamberlain v. Williamson, 2 Maule & S. 408, 414-16; Hovey v. Page, 55 Me. 142, 144-45; Wade v. Kalbfleisch, 58 N. Y. 282, 284, 17 Am. Rep. 250, 251; Shuler v. Millsaps, 71 N. Car. 297, 298-99; Allen v. Baker, 86 N. Car. 91, 94, 41 Am. Rep. 444; Harris v. Tyson, 63 Ga. 629, 630, 36 Am. Rep. 126, 127.

[24] See Yerrington v. Greene, 7 R. I. 589, 594-95, 84 Am. Dec. 578, 580-81; Greenburg v. Early, 30 Abb. N. C. 300, 301, where the employer was a firm.

[25] See as to an attorney, Seymour v. Cagger, 13 Hun, 29, 32. But compare, for contrary view, Smith v Hill, 13 Ark. 173, 176.

[26] See Janin v. Browne, 59 Cal. 37, 44, quoting an expression of Parke, B., in Siborne v. Kirkman, 1 Mees. & W. 418, at p. 423; also, Hawkins v. Ball's Admr., 18 B. Mon. 816, at pp. 819-20, 68 Am. Dec. 755, 757; Marvel v. Philips (Mass.), 40 Cent. L. J. 104.

[27] See especially Shultz v. Johnson's Admr., 5 B. Mon. 497, 501; Lacy v. Getman, 119 N. Y. 109, 114-15, 16 Am. St. Rep. 806, 808-9.

[28] See Janin v. Browne, 59 Cal. 37, 44; Shultz v. Johnson's Admr., 5 B. Mon. 497, 501; McGill's Creditors v. McGill's Admr., 2 Met. (Ky.) 258, 262. This criterion in its relation to survivorship of contracts in general, is considered in Billing's Appeal, 106 Pa. St 558, 560; Dickinson v. Calahan's Admr., 19 Pa. St. 227 233; and Siler v. Gray, 86 N. Car. 566, 576.

material factor in determining the intentions of the parties.[29]

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[29] A preference may at any rate be given to the phraseology used in Billing's Appeal, 106 Pa. St. 558, 560. See, also, Smith v. Wilmington Coal, etc., Co., 83 Ill. 498, at p. 500.

## SPECIAL CONTRACT — QUANTUM MERUIT— ISSUE.

## ROCKWELL STOCK & LAND CO. V. CASTRONI.

*Court of Appeals of Colorado, October 14, 1895.*

**1. A plaintiff who alleges and endeavors to prove a special contract, cannot at the same time offer proof to recover on a *quantum meruit* on an implied *assumpsit*.**

**2. The plaintiff is only entitled to maintain the issue which he has tendered.**

BISSELL, J.: As suggested in the antecedent opinion (42 Pac. Rep. 180), Joseph Castroni's suit was tried with Martha's action, and before the same jury. The record in this case shows some irregularities other than what appears in the wife's suit. Probably this comes from the circumstance of counsel's reliance on the main error committed in the trial of the suit brought by the other plaintiff, while in this he preferred to preserve all the questions. Some of them are probably not of sufficient gravity to upset the judgment, but they seem to require some little discussion in the settlement of the issue between the parties. No narration of the history of the case, other than what is contained in the statement preceding the other opinion, will be given, save to particularize some matters which were incidental to our conclusions in that matter. The alleged hiring on which Joseph sued occurred, if at all, at the time of the arrangement between the company and his wife, Martha, with reference to the establishment of the hennery. It was insisted on behalf of the plaintiff that, when the discussion occurred in the latter part of August, Mr. Rockwell hired him to go out to the farm and labor at whatsoever he might be called upon to do at an agreed price of $25 per month and his board. It was Joseph's contention that he was in no manner connected with the negotiations entered into between the company and his wife with reference to the establishment of the traffic in hens, but that he was hired independently, as a farm hand, to work at fixed wages. He insists he went out to the farm, and labored from that time on, until the disagreement between the parties in January, when he was discharged. The defendant company insists there was no agreement of this sort, but that he was simply hired, while the harvesting was going on, to do a specific class of work, for which he was to receive $1 per day and board. The company claimed to have paid him for all the time he worked. The issue was thus sharply defined as to the existence or non-existence of a contract of hiring for a definite period at a fixed wage. The testimony was directed to this end, though, in the progress of the trial, the plaintiff offered testimony to show the value of his services, and thereby established his right to recover for work and labor done upon a *quantum meruit*. When the case was concluded, the court, over the objection of the defendant, instructed the jury upon both hypotheses. The jury were told, if they should find the agreement to have been made as the plaintiff alleged, they were bound to find for him at the rate of $25 a month and his board, making whatever deduction was proper for any payments which had been made. The jury were further told, even though they might find from the evidence there was no such agreement as the plaintiff attempted to show, if they found he had done work for the company from the time of going out there to the day of his discharge, and found its value to be of a certain sum, they should return a verdict in accordance with such finding. Under the instructions, the jury were bound to find for the plaintiff, even though they might find there was no contract made, if they found he had done work which was of an ascertainable value. The case was tried on the 9th of February. On the conclusion of the trial, the jury returned a verdict that the company was indebted to the plaintiff in the sum of $15, which had been paid. The court refused to accept it, sent the jury back to their rooms, and they found a general verdict for $1 for the plaintiff. This verdict was promptly set aside. The court proceeded to retry the case at 2 o'clock of the day on which the verdict was returned, whereupon the company moved to continue it for a reasonable time to procure witnesses to meet the plaintiff's contention that he was entitled to recover on the basis of the value of his services, regardless of the special contract which he had attempted to prove. The showing would seem to make it clear that a severe snowstorm had occurred, which prevented the running of trains, and the procurement of witnesses in time to testify. The motion was overruled. The court proceeded to try the case, and the plaintiff had judgment for $114.46. The defendant company made the same application for security of costs in this case as in the other. The account which was filed before the justice, and which stood for the pleading in the county court, was simply: "The Stock and Land Company, debit, to four months' labor at $25 a month, and 18 days, and board."

Some of the chief difficulties which have been encountered in this case proceed from the circumstance that both cases were begun before the a justice without written pleadings. Since both these cases must go back for a new trial, it is suggested to the county court that both parties be ordered to file pleadings setting up their causes of action and defenses, respectively,

thereby putting the case in such shape as to relieve the appellate court, in case of any future appeal, of the difficulties which are experienced on the present hearing. Of course, it is true there is no difference, with respect to the principles which must be applied, in the trial of a case which comes by appeal to a court of record from a justice, and one which originates there, and is heard on written pleading. The legal rights of the parties are precisely the same. They must be determined on the same principles, and the plaintiff is bound to establish his cause by the same proofs. Stout v. Tribune Co., 52 Mo. 343. There is a well-recognized distinction between the forms of pleading by which a party is permitted to recover a debt under the Code, and those which must have been observed by him when the common-law procedure was in full force. The distinction between the common-law forms of *assumpsit* are thoroughly settled, and were well understood by lawyers who practiced under that system. The difference between the declaration in an action upon a special contract and one upon a *quantum meruit* was well-defined and thoroughly recognized. Of course, it was true, even under that system, a person might declare in general *assumpsit*, and recover upon proof of the value of his services, even though there was a special contract which constituted the basis of the action. This happened in the case where the contract had been completed by performance, and the only thing which remained to be done was to pay the contract price. This distinction was recognized and well settled. It was likewise established that, in declaring upon a *quantum meruit*, it was necessary to aver the implied promise which the law raised against the defendant, and therefore the forms always proceeded that the defendant promised and agreed to pay. We are, however, unconcerned with these distinctions, since the allegation of the promise and agreement to pay is not indispensable, whether the party sues on a special contract or on a *quantum meruit*. It is only needful for him to state the facts out of which his cause of action grows, and, these being proven, he may recover, whether he has alleged a promise by the defendant, or has omitted to state any. This is true in either case, though necessarily it would happen, in pleading the special agreement, the statement of its exact terms or their legal effect would probably result in averments which would show the defendant's promise. This would not be true in the case of the promise implied by the law, nor is it believed that any averment of this promise is at all necessary under the present system. Hurst v. Litchfield, 39 N. Y. 377; Sussdorff v. Schmidt, 55 N. Y. 319; Kerstetter v. Raymond, 10 Ind. 199; Green v. Gilbert, 21 Wis. 401; Pom. Rem. & Rem. Rights, § 543 *et seq*. This discussion is only indulged in because counsel, in their arguments, seem to have confused the principles announced by the various cases which declare the proper rule for the construction of pleadings, and those which determine the legal rights of the parties. It seems to be universally true that there can be no promise implied by the law where an express one is both laid and proven. The allegation of an express promise destroys the possibility of the implication, for the last only exists by virtue of the legal obligation cast upon the party, by virtue of a performance by one without an express agreement by the other. It is a very familiar doctrine in the law, so well established and so long existing as to be worthy the term "elementary." It is useless to discuss it, state the various forms which it may take, or the circumstances under which such contract is enforceable. It is enough to say the statement of the express agreement will exclude the existence of one resulting by operation of law from the acts of the parties. Weston v. Davis, 24 Me. 374; Whiting v. Sullivan, 7 Mass. 107; Galloway v. Holmes, 1 Doug. (Mich.) 330; McClelland v. Snider, 18 Ill. 58; Hancock v. Ross, 18 Ga. 364; Hill v. Balkcom, 79 Ga. 444, 5 S. E. Rep. 200; Delaplaine v. Turnley, 44 Wis. 31.

It must be understood the antecedent discussion, and the citation of these authorities, are not intended to decide the general question of the rules of pleading in such cases, nor the right of a plaintiff to recover on any special contract which he may prove, even though his complaint has taken the form of a declaration to recover for services according to their value. That is not the question at issue. This concerns the right of the plaintiff to both allege and prove a special contract, and in the same action offer evidence to establish the value of the work which he has done, and have the jury instructed that he is entitled to recover in either case,—in the one, because there was a special contract for a definite wage; and in the other, because he rendered services of a proven value. It is simply decided, if the plaintiff declares on a special contract, and undertakes to prove it, he may not at the same time offer proof of the value of his services, and recover, according as the jury may conclude with reference to the matter. We do not disagree with a certain line of authorities which holds that, where there is a controversy between parties as to the agreed price at which work was to be done, evidence may be introduced of the value of the work for the purpose of supporting the plaintiff's contention respecting the agreed price. There are well-considered cases in this direction. Allison v. Horning, 22 Ohio St. 138; Richardson v. McGoldrick, 43 Mich. 476, 5 N. W. Rep. 672. No such question was presented here. The contention between the plaintiff and defendant was not as to what the agreed price was, but it was a sharply-defined issue, made by the assertion on the one side of a contract for employment at a fixed wage, and a denial on the other of the making of any contract at all. The plaintiff was thus only entitled to maintain the issue which he tendered, and to have the jury instructed that he might recover if they should find the contract to

be as he had laid it, and according to its terms. The defendant's objection to the instruction which permitted him to recover on a *quantum meruit* was well taken, and the court should have given the instruction which the defendant company asked.

The case must be reversed because of this error in the instructions. There are some matters to which it seems wise to call the attention of the trial court, even though they be not deemed sufficiently radical to reverse the judgment. There is no necessity to re-express our views concerning the limitation which the court placed on the defendant's right to argue the case. The two cases were tried together. The abstract which was filed in this court covers nearly 100 pages, and it would seem as though a liberal exercise of the court's authority would have given the defendant a greater latitude. We need not repeat what was said concerning the motion for security of costs. It would seem to be a case in which the order might properly be made, if an adequate showing in conformity to the statute were aptly and duly presented. The refusal of the court to continue the case after it set aside the verdict must have worked considerable hardship to the defendant, under the assumption that the evidence respecting the value of the services was properly introduced. Where a case has been tried and a verdict returned, a reasonable time should be permitted to elapse, if the defendant makes an application therefor, before he is crowded into a further trial of the same controversy. Nothing further need be said about it, as the thing is not likely to occur on the subsequent trial of the case. We discover no other errors of sufficient magnitude to justify a discussion, or to call for an expression of the court's opinion. Reversed.

NOTE.—*Special Contract Controls.*—An implied contract cannot exist when there is an existing special contract about the identical thing. The right to bring *indebitatus assumpsit* for money due on an executed contract does not authorize a party to abandon the contract and sue on a *quantum meruit*. Where parties have made a special contract none can be implied. Cutler v. Powell, 6 Term R. 324; Touissant v. Martinant, 2 Term R. 100, 104; Young v. Paxton, 4 Cranch (U. S.) 229; Raymond v. Barnard, 12 Johns. (N. Y.) 374; Whiting v. Sullivan, 7 Mass. 107, 109; Robertson v. Lynch, 18 Johns. (N. Y.) 456; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78; Scoville v. Miller, 40 Ill. App. 237, 241; Jennings v. Camp, 13 Johns. (N. Y.) 96; Wood v. Edwards, 19 Johns. (N. Y.) 212; Miller v. Watson, 4 Wend. (N. Y.) 275; Shepard v. Palmer, 6 Conn. 100; Russell v. South Brittain, 9 Conn. 522; Londregon v. Crowley, 12 Conn. 561; Hull v. Heighman, 2 East, 145; Weston v. Downes, Dug. 23; Morrison v. Ives, 4 Sm. & M. (Miss.) 652; Pringle v. Samuels, 1 Bibb (Ky.), 172; Christie v. Price, 7 Mo. 433; Stollings v. Sappington, 8 Mo. 119; Chambers v. King, 8 Mo. 519; Charles v. Dana, 14 Me. 387; Chesapeake, etc., Canal Co. v. Knapp, 9 Pet. (U. S.) 365; Hill v. Balkcom, 79 Ga. 444; Hancock v. Ross, 18 Ga. 364; Anderson v. Dickinson, 72 Hun, 556. So where there is a specified contract for a stipulated amount, and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied *assumpsit*. Walker v. Brown, 28 Ill. 378; Miller v. Watson, 4 Wend. (N. Y.) 275; Wright v. Butler, 6 Wend. (N. Y.) 284; Shepard v. Palmer, 6 Conn. 100; Christie v. Price, 7 Mo. 433; Eyser v. Weissgerler, 2 Iowa, 463; Freher v. Geeseka, 5 Iowa, 472; Formholz v. Taylor, 13 Iowa, 500; Imhoff v. House, 36 Neb. 28; Stock Co. v. Lamb, 38 Neb. 339. See, also, Succession of Jackson, 47 La. Ann. 1089.

*The Allegata and Probata Must Agree.*—It is a familiar rule in pleading, that a party who bases his right of recovery upon the breach of a special contract cannot recover upon proof of the breach of an implied contract. Armacost v. Lindley, 116 Ind. 295. Hence when the plaintiff declares on a special contract, as in the principal case, and proves it, he cannot recover on a *quantum meruit*. Mayer v. Ver Bryck (Neb.), 64 N. W. Rep. 691. He is not allowed to allege one cause of action and prove another upon the trial. The *allegata* and *probata* must agree. Imhoff v. House, 36 Neb. 28. After alleging and proving a special contract, this negatives the claim of an implied contract, and no evidence can be introduced to prove something that does not exist, besides the proof would not agree with the allegations. Whiting v. Sullivan, 7 Mass. 109; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78; Scoville v. Miller, 40 Ill. App. 241.

To recover upon a *quantum meruit*, facts justifying such recovery must be pleaded and then proved. Stock Co. v. Lamb, 38 Neb. 339. And so when the plaintiff insists on the benefits of a special contract he must declare on it; otherwise he might count on one contract and recover on another. Algeo v. Algeo, 10 Serg. & R. (Pa.) 235; Schaffner v. Kober, 2 Ind. App. 409, 411; Condran v. New Orleans (La.), 9 South. Rep. 31.

*Indebitatus Assumpsit.*—When a contract has been performed, the plaintiff may recover on a simple contract the price of the services under *indebitatus assumpsit*, but then the contract must regulate the amount of the recovery. Bank v. Patterson, 7 Cranch (U. S.), 299; Holmes v. Stummel, 24 Ill. 370; James v. Colton, 7 Bing. 266. But the right to bring *indebitatus assumpsit* for money due on an executed contract does not authorize a party to abandon the contract and sue on a *quantum meruit*. Walker v. Brown, 28 Ill. 278. *Indebitatus assumpsit* will lie to recover the stipulated price due on the special contract, not under seal, when the contract has been completely executed; and in such case it is not necessary to declare upon the special contract. Bank v. Patterson, 7 Cranch (U. S.), 299; Chesapeake, etc. Canal Co. v. Knapp, 9 Pet. (U. S.) 566; Stafford v. Sibley (Ala.), 17 South. Rep. 324; Manson v. Botts, 80 Mo. 651; Dermott v. Jones, 2 Wall. (U. S.) 9; Gaus v. Manuf. Co., 113 Mo. 98; Williams v. Railroad Co., 112 Mo. 463; Yeates v. Ballentine, 56 Mo. 336. The plaintiff may recover upon the general counts for work done; and the addition of a special count setting forth a contract different in terms from the one proved will not affect his right to recover upon the general counts. Londregon v. Crowley, 12 Conn. 558. And when the plaintiff has a right to sue on a *quantum meruit* for part performance, the general rule is that the contract must regulate the price for the work done. Paradine v. Jayne, Aleyn, 27; Beal v. Thompson, 3 Bos. & Pul. 420; Beebe v. Johnson, 19 Wend. (N. Y.) 500; Dermott v. Jones, 2 Wall. (U. S.) 1; School Trustees v. Bennett, 3 Dutch. (N. J.) 513; Williams v. Railroad Co., 112 Mo. 463; Gaus v. Manuf. Co., 113 Mo. 98; Brecknock Co. v. Pritchard, 6 Term. R. 750.

D. H. PINGREY.

## BOOK REVIEWS.

COOLEY ON TORTS.

This is a volume of a little over four hundred pages, ordinary law book size, and is neat in appearance, good as to mechanical execution and convenient to handle. As is announced in the preface this volume "has been prepared primarily for the use of students at law and instructors in law schools, and designs to present succinctly the elements of the law of torts." The works of this very eminent author are among the best in legal literature. His familiarity with the subject and his great experience in teaching law make entirely unnecessary any extended remarks as to his peculiar fitness to prepare a student's work on torts. Judge Cooley is one of those who believe that the student is entitled to the very best, and in this age of cheap and defective law books the appearance of such a volume as the one before us is very welcome. The subject of torts has become almost a bug-bear to students and instructors, and much of the difficulty attending its study in law school has no doubt arisen from the lack of adequate, and at the same time concise introduction and definition in the text books. Judge Cooley's first two chapters, devoted to the consideration of rights and wrongs as known to the law, and a general classification of legal rights, present in a brief space a very thorough and satisfactory explanation. The following quotation beginning on the first page, is noteworthy, and serves to explain the standpoint of the author: "Wrongs for which individuals may demand legal redress are classified as, first, those which consist in a breach of contract; and second, those which are independent of contract. The classification is not strictly accurate, since there are many cases in which on the same state of facts the injured party may at its option count upon a breach of contract as his grievance, and complain in such form that the breach of contract is not the gist of the action. These cases make clear the lack of utility and convenience of the classification, and that it may be misleading. And it is perhaps more correct to say, as to the second class, that it embraces those wrongs which arise out of conduct which, while it may be involved in the breach of a contract is accompanied by some other unlawful element." The learned author then defines a tort to be "any wrong not consisting in a mere breach of contract for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer." Any one who reads these paragraphs and the context cannot but feel the breaking in of a great light. The nature and classification of rights and wrongs, the remedies for civil injuries and the rules of legal responsibility which apply in case of torts are considered in the first thirty-five pages of this book, in a manner more satisfactory than we have elsewhere found. On every page there is evidence that the writer was master of his subject and that he understood precisely what he wanted to say. The text is clear and terse, and the propositions of law are stated in an unequivocal manner. We find no discussion of ancient and modern theories of doubtful value; and no unnecessary criticisms of the views of other legal writers. This is a course of conduct which we cannot too highly recommend to those who prepare books for the use of students. The notes are excellent and sufficient. They seem to avoid all discussion of collateral matters and to be confined to the illustration and explanation of the propositions of the text. The citation is up to date, and as far as we have had opportunity to examine the cases support the statements of law. We have noticed in several instances reference to modifications of old rules of law, made by very recent cases. It is important, for example, under the head of libel to notice the tendency of legislation to confine the recovery to actual damages "in cases where the publication complained of was made in good faith, there being reasonable grounds for believing the statements to be true, if, after the falsity or mistake in the publication was brought to the knowledge of the publisher of the paper making it, a correction or retraction was printed in the next two regular issues thereof, in as conspicuous a manner and place as was the libel itself." And, in considering the action for injuries which one may suffer in the relation of parent and child, it is important to note, that there is a revolt from the old rule basing the action upon the relation of master and servant, and that "in this country there has been a tendency toward a more liberal and more reasonable action basing the right of action upon parental relation." We approve very highly of the double method of citation. So many lawyers depend for the decisions of courts other than those of their own State, upon the different series of selected cases that it seems to us where a case is re-reported in one of those series that the citation should refer to such series as well as to the official volume. The table of contents is really what its name imports, and shows the contents of the book. The table of cases contains not only the names of cases, but the reports as well, and shows that a great number of cases have been consulted, and is very valuable as reference. The index is full and has evidently been prepared with a view to the assistance it will render in the use of the book. We recommend the volume to students and instructors of law, and to all those who wish to have, in a short space, a clear and accurate treatment of that difficult department of law falling under the head of torts.

NEGLIGENCE OF IMPOSED DUTIES — CARRIERS OF FREIGHT.

The author of this work has heretofore written an acceptable treatise on the Negligence of Imposed Duties as applied Personally and to Carriers of Passengers. The present treatise discusses in an elaborate manner the subject of the liability of carriers of freight for negligence in transportation of goods and freight. It treats in successive chapters of the liability and duty to provide safe transportation, limitation of liability by contract and by statute, acceptance of goods by carrier, bills of lading, "act of God," "perils of the sea," "fire clause," freight charges regulated by value of article, transportation of cattle, packing and storing goods, deviation from route, delay of transportation of goods, connecting lines, interstate and State commerce, competition, discrimination and continuous carriage, unjust discrimination, freight charges and carrier's lien, delivery of goods, and action against carriers of goods. The book is well prepared, the text being clear and concise, and the citation of authorities is exhaustive. It is not a mere digest of authorities, but the author frequently enters into a discussion of the principles, and does not hesitate to express his own opinion on controverted questions, which his standing as a lawyer and ex-chief justice of the Supreme Court of Indiana renders of more than ordinary value. The book is quite bulky, being nearly twelve hundered pages, with a good index. Published by the Lawyers' Co-operative Publishing Co., Rochester, N. Y.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ABATEMENT—Action Pending.—Pending an action in one county to determine the liability of a deceased surety on a guardian's bond, an action will not lie in another for the same purpose, and to subject the decedent's estate to the payment of the debt.—MCNEILL v. CURRIE, N. Car., 23 S. E. Rep. 216.

2. ACCIDENT INSURANCE— Condition — Disability.—A company is not liable on its accident policy insuring against loss of time for injuries through external and accidental means which shall, independently of all other causes, "immediately" and wholly disable the insured from transacting any business in his occupation, where the insured, injured by a fall, was able for two months to attend partially to his business, but at the end of that time became totally incapacitated by a stroke of paralysis which was the direct result of the accident.— MERRILL v. TRAVELERS' INS. CO. OF HARTFORD, CONN., Wis., 64 N. W. Rep. 1039.

3. ACCORD AND SATISFACTION.—To establish a plea of accord and satisfaction under the statute, it must not only appear that there was an agreement to accept, in full settlement of an obligation, something different from or less than that to which one of the parties thereto is entitled, but it must be shown that such agreement has been fully executed, and the obligation extinguished by the creditor's actual acceptance of the consideration specified in the agreement constituting an accord.— CARPENTER v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 64 N. W. Rep. 1120.

4. ADMINISTRATOR—Action by Heirs.—Heirs of a deceased minor cannot maintain an action against the administrator, who was also deceased's guardian, and his sureties, to recover money coming into the hands of such administrator and guardian by virtue of his guardianship, until there has been a settlement on his accounts as such guardian.—CRAIN v. VINCENT, Ky., 32 S. W. Rep. 759.

5. ADMINISTRATION—Action on Note Due Decedent.—The right to maintain an action upon a promissory note belonging to the estate of a deceased person is vested in the personal representative of the deceased, and not in his heir at law.—PRESBURY v. PICKET, Kan., 42 Pac. Rep. 405.

6. ADMINISTRATION — Claims against Estates.—One who claims to be a beneficiary of funds received by a decedent as trustee must present his demand against the estate for allowance, like other claims, unless the identical trust property, or its product in a new form, can be traced into the possession of the personal representatives.—MCGRATH v. CARROLL, Cal., 42 Pac. Rep. 466.

7. ADVERSE POSSESSION.—Actual occupation of land up to a boundary fence will not give title by adverse possession, it being claimed by one of the owners that it was not the true boundary, and understood by both that the true line was to be ascertained by a survey.—PETERS v. GRACIA, Cal., 42 Pac. Rep. 455.

8. ADVERSE POSSESSION.—The possession of a decedent's land by his widow and child as such is not adverse to decedent's children by former marriage.—HULVEY v. HULVEY, Va., 23 S. E. Rep. 233.

9. APPEAL.—An appeal from a decree dismissing a bill the whole object of which was to secure a right to vote at an election of delegates to a State constitutional convention will be dismissed if, before the appeal was taken, the date fixed for the election had passed, and, before the entry of the appeal, the convention had assembled.—MILLS v. GREEN, U. S. S. C., 16 S. C. Rep. 132.

10. APPEAL — Accepting Benefits of Judgment.—A sale of land set off to one by judgment in partition bars his right of appeal.—MCGREW v. KITCH, Ind., 41 N. E. Rep. 1027.

11. APPEAL — Affirmance. — Where several parties unite in a joint assignment of error, the judgment will be affirmed on appeal unless the assignment is good as to all.—KEMPF v. UNION SAVINGS & LOAN ASS'N, NO. 2, Ind., 41 N. E. Rep. 1065.

12. APPEAL—Rehearing. — This court will not consider, and therefore will not allow a rehearing for the discussion of the constitutionality of a law in a respect or particular not affecting the controversy to be decided.— VALLIER v. BRAKKE, S. Dak., 64 N. W. Rep. 1119.

13. APPEAL BOND—Waiver of Defects.—After a general appearance on appeal from a justice of the peace, a party is not entitled, in response to a motion for security for costs, to have the appeal dismissed because the sureties on the appeal bond did not justify before the justice, as required by How. Ann. St. § 7000.—SHERWOOD v. IONIA CIRCUIT JUDGE, Mich., 64 N. W. Rep. 1045.

14. APPEAL FROM JUSTICE'S COURT.—On appeal from a judgment of a justice of the peace by defendants against whom the judgment was rendered, other defendants jointly liable, but not served, are not adverse parties, on whom the notice of appeal must be served.

—TERRY v. SUPERIOR COURT OF SAN DIEGO COUNTY, Cal., 42 Pac. Rep. 464.

15. APPEARANCE—Summons.—A special appearance to move or set aside a summons for irregularity of service, with costs of the motion, is not a waiver of want of jurisdiction.—KINGSLEY v. GREAT NORTHERN RY. CO., Wis., 64 N. W. Rep. 1036.

16. ARREST OF FLEEING CRIMINAL — Reward. — Code 1892, § 1387, allows a reward for the arrest of "any one who has killed another, and is fleeing or attempting to flee before arrest," to be paid by the county in which the "homicide occurred." One who wounded another, while his victim was still alive, was arrested, and tried for assault with intent to kill, and discharged. On his victim's subsequently dying, he fled: Held, that one arresting him was entitled to the reward.—NEWTON COUNTY v. DOOLITTLE, Miss., 18 South. Rep. 451.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Hill's Ann. Laws, § 3173 *et seq.*, providing a procedure for the settlement of estates assigned for the benefit of creditors, and authorizing the court to discharge the assignors in certain cases from pre-existing liabilities, deprives equity of its ordinary jurisdiction touching the administration of insolvent estates.—SPRINKLE v. WALLACE, Oreg., 42 Pac. Rep. 487.

18. ASSIGNMENT OF CHOSE IN ACTION—Receiver.—A corporation assigned certain accounts payable, being only a small portion of its assets, to a trustee, to secure certain creditors. The trustee immediately accepted the trust, and notified the secured creditors and also the parties owing the accounts. Afterwards, but on the same day, a receiver was appointed in a suit brought by a creditor to wind up the corporation: Held, that the secured creditors should be first paid out of the proceeds of the assigned accounts collected by the receiver, since such an assignment is enforceable in equity.—CHICAGO TITLE & TRUST CO. v. SMITH, Ill., 41 N. E. Rep. 1076.

19. ATTACHMENT.—Where defendant's property is attached while in the possession of one who is not summoned and returned as garnishee, the failure of the latter, even when he is the plaintiff in the attachment suit, to give defendant notice of the attachment, will not invalidate the proceeding.—REGISTER v. WOODWARD IRON CO., Md., 33 Atl. Rep. 320.

20. ATTACHMENT — Insufficient Affidavit.—An attachment, in an action to recover damages for breach of contract to convey real estate, that has been issued upon an affidavit which fails to enumerate any of the acts or omissions constituting actionable detriment, under section 4586 of the Compiled Laws, and which states no ground for damages ascertained or ascertainable by reference to the contract, or from which the court can definitely determine, by any fixed rule of law or measure of damages, the amount which plaintiff is entitled to recover, should be, on motion, vacated and discharged. — NARREGANG v. MUSCATINE MORTGAGE & TRUST CO., South Dak., 64 N. W. Rep. 1129.

21. ATTACHMENT BOND—Obligee.—In the attachment of property alleged to have been fraudulently conveyed the attachment bond may properly be made payable to the alleged fraudulent debtor.—ARCHENHOLD v. B. C. EVANS CO., Tex., 32 S. W. Rep. 795.

22. ATTORNEY AND CLIENT—Action for Services.—The guaranty of Const. U. S. Amend. 6, that a person accused of crime shall be entitled to counsel, does not include a guaranty that such counsel shall be furnished at the expense of the public. — HOUK v. BOARD OF COM'RS OF MONTGOMERY COUNTY, Ind., 41 N. E. Rep. 1068.

23. ATTORNEY AND CLIENT—Privileged Communications. — Communications by parties to an attorney acting professionally for all in the same transaction are not, as between such parties, privileged.—LIVINGSTON v. WAGNER, Nev., 42 Pac. Rep. 290.

24. BANKS—Refusal to Pay Check—Damages.—Where a check, properly indorsed, was by due course of mail sent for collection to the bank on which it was drawn, the drawer having at the time sufficient funds on deposit in that bank with which to pay the check, and it was returned unpaid, this was in effect a refusal to pay, although there was no protest or willful dishonor of the paper, and in such case the bank, even though there was no proof of special damage, was liable to the drawer of the check for such "temperate" damages as would be a reasonable compensation for the injury, and in legal contemplation this means something more then mere nominal damages. — ATLANTA NAT. BANK v. DAVIS, Ga., 23 S. E. Rep. 190.

25. BILL OF EXCEPTIONS.—Entering judgment on a verdict without formally overruling a pending motion to set aside the verdict is a mere informality, not assignable as error.—FERRIS v. COMMERCIAL NAT. BANK OF CHICAGO, Ill., 41 N. E. Rep. 1118.

26. BOND — Construction.—A bond conditioned that the obligor pay off a mortgage on land part of which he had conveyed to the obligee does not merely bind him to save harmless the obligee from the mortgage to the extent of the value of the land, but requires the obligor to compensate the obligee for whatever sum he may be required to pay to save his land from the mortgage, to the extent of the penalty of the bond.—JACKSON v. STEFFENS, Tex., 32 S. W. Rep. 862.

27. CARRIERS OF PASSENGERS — Carriers—Depot Platform—Lights.—Sayles' Supp. Rev. St. art. 4238, requiring railroad companies to keep their depots lighted, requires the lighting only of such platforms or approaches as are necessary for ingress and egress of passengers; and where a passenger is injured at night by falling over an obstruction on an unlighted south platform of a union depot, and it appears that the trains of several of the defendant companies stop on that side of the depot, the question of the negligence of a company whose trains stop at a platform on the north side is for the jury.—TEXAS & P. RY. CO. v. REICH, Tex., 32 S. W. Rep. 817.

28. CARRIERS OF PASSENGERS — Liability of Sleeping-Car Company.—Relatively to a passenger occupying a berth in a sleeping car, for which he has paid the customary fare, a sleeping-car company is under the duty of maintaining such watch and guard while the passenger is sleeping as may be reasonably necessary to secure the safety of such money, jewels, and baggage as he may properly carry on his person or have in his possession while traveling in the car; and if, while he is asleep, such property is taken from his possession, the burden is upon the company of showing the loss did not occur because of a failure upon the part of its employees to discharge this duty.—KATES v. PULLMAN PALACE CAR CO., Ga., 23 S. E. Rep. 186.

29. CERTIORARI — Order in Contempt.—*Certiorari* will not issue to review an order of court adjudging the petitioner guilty of contempt in disposing of his property in violation of a decree of divorce enjoining him from so doing, on the ground that the restraint is perpetual, since it is an error which can be corrected by appeal.—WHITE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 480.

30. CERTIORARI TO JUSTICE'S COURT.—In an action in justice's court, in the absence of an appearance or objection by defendant, where an affidavit in form sufficient to sustain plaintiff's claim is introduced, defendant cannot for the first time raise the question by *certiorari* that the preliminary service entitling plaintiff to make use of it was not made.—FORBES LITHOGRAPH MANUF'G CO. v. WINTER, Mich., 64 N. W. Rep. 1053.

31. CONFLICT OF LAWS — Limitations.—Actions on contract are subject to the limitations of the State where brought, and not of the State where the contract is made.—TILLIARD v. HALL, Tex., 32 S. W. Rep. 863.

32. CONSTITUTIONAL LAW—Cruel and Unusual Punishment.—A State statute providing that a person who has been before convicted of crime shall suffer a severer punishment for a subsequent offense than for a first offense is not invalid as subjecting him to be put twice in jeopardy for the same offense.—MOORE v. STATE OF MISSOURI, U. S. S. C., 16 S. C. Rep. 179.

33. CONSTITUTIONAL LAW — Irrigation Companies.—The act approved March 26, 1895, known as the "District Irrigation Law," provides that, when bonds are authorized by a vote of any irrigation district, application may be made to the district court of the county in which such district or part thereof is situated, for an order confirming and approving the same. At the time set for hearing, and after notice by publication to all concerned, any person interested in said district may appear and resist such application; and the court may examine into and determine all questions pertaining to the organization of the district, as well as the regularity of the voting and issuing of such bonds: Held not to contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the State or federal constitution.—BOARD OF DIRECTORS OF ALFALFA IRRIGATION DIST. v. COLLINS, Neb., 64 N. W. Rep. 1086.

34. CONSTITUTIONAL LAW—Judicial Power.—The provision in section 6 of the act of congress of June 22, 1874, that no payment shall be made to an informer furnishing information which leads to the seizure of smuggled goods in a case where judicial proceedings have been had, unless the value of his services shall have been certified by the court or judge for the information of the secretary of the treasury, who, however, shall not be bound by such certificate, is an attempt to confer upon the court or judge a power not judicial, which congress has no power, under the constitution, to require the judiciary to exercise; and, accordingly, the courts and judges are without jurisdiction to make such certificate.—EX PARTE RIEBELING, U. S. D. C. (Tex.), 70 Fed. Rep. 810.

35. CONSTITUTIONAL LAW — Lack of Uniformity.—The county government act, § 190, subd. 16 (St. 1891, p. 385), in allowing a witness in a criminal case before the superior court of counties of the twenty-eighth class alone, "subject to the discretion of the court," the same *per diem* and mileage as jurors in like cases, violates Const. art. 1, § 11, requiring general laws to have a "uniform operation."—TURNER v. SISKIYOU COUNTY, Cal., 42 Pac. Rep. 434.

36. CONTEMPT.—Where a court, without jurisdiction adjudges a person guilty of contempt for refusing to comply with its decree, but temporarily suspends the execution of the judgment, prohibition is the proper remedy to test the validity thereof.—COSBY v SUPERIOR COURT OF LOS ANGELES COUNTY, Cal., 42 Pac. Rep. 460.

37. CONTEMPT OF WITNESS — Refusal to be Sworn.—A witness in attendance upon a court who, on being ordered to be sworn or affirmed, contumaciously refuses, is guilty of a contempt of court, and is punishable therefor.—WILCOX v. STATE, Neb., 64 N. W. Rep. 1072.

38. CONTRACT.—Plaintiff agreed to lease to defendant certain premises at expiration of an existing lease. There were on the premises certain fixtures belonging to the tenant, which, under the lease, plaintiff was to buy at an appraised price. The agreement to lease provided that defendant should "be entitled to take" said fixtures at their appraised value, or to purchase them direct from the tenant, and that at the expiration of defendant's lease plaintiff shouldbuy said fixtures from him: Held, that defendant was bound to purchase the fixtures, his only option being as to the mode of purchase.—STREET v. CHICAGO WHARFING & STORAGE CO., Ill., 41 N. E. Rep. 1108.

39. CONTRACT — Compromise — Consideration. — A promise made in consideration of the compromise of an unenforceable claim, which both parties believe at the time was enforceable, is based on sufficient consideration.—SWEITZER v. HEASLEY, Ind., 41 N. E. Rep. 1064.

40. CONTRACT—Consideration.—A waiver by a landlord of his lien for rent on crops of his tenant is a sufficient consideration to support a promise by a vendee of the crops to pay to him the rent.—SHARP v. CARMODY, Ky., 32 S. W. Rep. 749.

41. CONTRACT—Consideration.—A new contract may be substituted for an executory contract of employment, not performed in whole or in part by either, without a new consideration other than the mutual acquittance of each other in the old promise.—BROWN v. CATAWBA RIVER LUMBER CO., N. Car., 23 S. E. Rep. 253.

42. CONTRACT—Failure to Perform.—One who accepts a well as completed according to the contract for drilling it cannot, in an action for the contract price, claim that the contract was not performed.—ELWOOD NATURAL GAS & OIL CO. v. BAKER, Ind., 41 N. E. Rep. 1068.

43. CONTRACTS — Implied Stipulations. — In the absence of anything to the contrary, incidental stipulations necessary to carry a contract into effect, or make it reasonable, or comfortable to usage, are implied therefrom.—MORROW v. BOARD OF EDUCATION OF CITY OF CHAMBERLAIN, S. Dak., 64 N. W. Rep. 1126.

44. CONTRACT—Interpretation— Engineer's Estimate. —The provision in a construction contract that, when the work is completed, there shall be a final estimate made by the engineer of the quantity, character, and value of the work, agreeably to the terms of the contract, and the balance, after deducting monthly payments, and on the contractor's giving a release, will be paid in full, is not an agreement that the engineer's estate shall be conclusive.— CENTRAL TRUST CO. OF NEW YORK v. LOUISVILLE, ST. L. & T. RY. CO., 70 Fed. Rep. 282.

45. CONTRACT—Validity.—Where testator left property to his wife for life, with remainder to his children who survived his wife, a contract between them, during her life, that the shares of the children should be regarded as vesting at the death of testator, and the survivorship clause be disregarded, is valid.—IN RE RALSTON'S ESTATE, Penn., 33 Atl. Rep. 273.

46. CONVERSION—Intermingling of Crops. — Where goods of the same kind and value, belonging to different owners, are intermingled and confused by one owner willfully, but not in bad faith, the other owner does not thereby become the owner of the whole; but when the part of the whole mass belonging to the latter is, by reason of such confusion, made uncertain, every reasonable doubt as to the amount of his share must be resolved in his favor.—D. M. OSBORNE & CO. v. CARGILL ELEVATOR CO., Minn., 64 N. W. Rep. 1135.

47. CORPORATIONS — Director.— A director has the right to take an assignment of a claim against an insolvent corporation for the unpaid purchase price of land, and enforce the same for the amount paid, and a judgment entered thereon will be prior to subsequent judgments, though the original vendor's lien be lost by the assignment.—BONNEY v. TILLEY, Cal., 42 Pac. Rep. 439.

48. CREDITORS' SUIT—Limitations of Actions.—An action for the purpose of settling a trust estate becomes one for the benefit of general creditors by a decree requiring a report of all outstanding debts, and restraining the general creditors from maintaining separate actions.—HOUCK'S ADM'R v. DUNHAM, Va., 23 S. E. Rep. 238.

49. CRIMINAL EVIDENCE—Confession.—A confession to an officer making the arrest, who cautioned defendant that whatever he might say would be used as evidence against him, and who informed defendant "that it might go lighter with him if he told all about" the crime, was admissible, in the discretion of the court.—THOMAS v. STATE, Tex., 32 S. W. Rep. 771.

50. CRIMINAL EVIDENCE—Homicide—Res Gestæ.—The declaration of deceased, made a few minutes after he was shot, that he struck defendant because he saw defendant was going to shoot him, is *res gestæ*.—LINDSEY v. STATE, Tex., 32 S. W. Rep. 768.

51. CRIMINAL EVIDENCE — Rape — Chastity of Prosecutrix.—Upon a charge of rape, testimony that the general reputation of the prosecutrix for chastity is not good is competent, but testimony of specific acts of unchastity is not competent to prove her probable consent to sexual intercourse with the defendant.—STATE v. BROWN, Kan., 42 Pac. Rep. 363.

52. CRIMINAL LAW—Amendment of Record.—After the expiration of the term at which a criminal case is tried the court cannot amend the record so as to show the venue of the case.—BELCHER v. STATE, Tex., 32 S. W. Rep. 770.

53. CRIMINAL LAW—False Pretenses—Variance.—The mere fact that a false pretense of an existing or past fact, by reason of which the owner of money or property is induced to part with the same, is accompanied by a future promise, will not take the case out of the operation of the statute which prohibits and punishes the obtaining of money by false pretenses.—STATE v. GORDON, Kan., 42 Pac. Rep. 346.

54. CRIMINAL LAW—Felony Trial—Verdict.—A verdict in a felony case is not invalid because rendered in the absence of accused, notwithstanding How. Ann. St. § 9568, providing that no person indicted for a felony shall be tried unless personally present during the trial; he being out on bail, and verdict being rendered during court hours.—FREY v. CALHOUN CIRCUIT JUDGE, Mich., 64 N. W. Rep. 1047.

55. CRIMINAL LAW—Forgery.—Though furnishing intoxicating liquors to Indians is prohibited by law, Indians may be convicted of forging an order to furnish liquor to "bearer."—PEOPLE v. JAMES, Cal., 42 Pac. Rep. 479.

56. CRIMINAL LAW — Former Jeopardy — Incest.—An acquittal for rape does not bar a prosecution for incest arising from the same transaction.—STEWART v. STATE, Tex., 32 S. W. Rep. 766.

57. CRIMINAL LAW — Homicide.—Though defendant was in the act of committing a forcible trespass, deceased was not justified in trying to kill him in attempting to prevent it.—PEOPLE v. HECKER, Cal., 42 Pac. Rep. 307.

58. CRIMINAL LAW—Homicide—Insanity.—In a prosecution for murder, the defense relied upon being insanity at the time of the homicide, an order previously made by the proper county board finding the accused to be a fit subject for treatment in the hospital for the insane, is at most evidence of the defense relied upon, and raises no conclusive presumption that the accused was at the time in question insane, in the sense that he is not accountable for the act charged.—PFLUEGER v. STATE, Neb., 64 N. W. Rep. 1094.

59. CRIMINAL LAW—Homicide—Insanity.—Where, on a trial for murder, insanity is relied on as a defense, an expert may testify to statements made to him by the defendant of previous sufferings, which formed the basis of, and are declared by him to be necessary to, his diagnosis of the case.—PEOPLE v. SHATTUCK, Cal., 42 Pac. Rep. 315.

60. CRIMINAL LAW — Homicide—Malice.—On the trial of a person charged with murder the jury ought not to be instructed that, the killing with a deadly weapon being admitted, the presumption therefore is that such killing was done with malice and that this presumption stands until it is rebutted by evidence. It would be better to instruct them that malice may be inferred from the fact of killing with a deadly weapon, and that they should consider this circumstance in connection with all the other evidence in the case for the purpose of determining whether the act was malicious or not.—STATE v. EARNEST, Kan., 42 Pac. Rep. 359.

61. CRIMINAL LAW — Jeopardy.—Where the separate property of two persons is stolen from each at the same time, a conviction for theft from one is not a bar to a prosecution for the theft from the other.—STATE v. BYNUM, N. Car., 23 S. E. Rep. 219.

62. CRIMINAL LAW — Larceny.—One who obtains money from another on the pretense that he will bet it for him on a race, which he pretends to do, and converts the money to his own use, is guilty of larceny.—DOSS v. PEOPLE, Ill., 41 N. E. Rep. 1093.

63. CRIMINAL LAW — Murder — Self-defense.—Where one endeavors to withdraw from a fight, but cannot do so by reason of the hostile opposition of his adversary, and to continue the attempt would result in death or great bodily harm, he may kill his adversary in self defense.—STATE v. POE, Dela., 33 Atl. Rep. 257.

64. CRIMINAL LAW — Objections to Information.—The objection that the information in a criminal case does not state facts sufficient to constitute a public offense must be first made in the trial court, either by demurrer to the information, or at the trial under a plea of not guilty, or after the trial by motion in arrest of judgment.—STATE v. HINCKLEY, Idaho, 42 Pac. Rep. 510.

65. CRIMINAL LAW — Presentment by Grand Jury.—Const. 1879 omits all reference to presentments as a mode of charging a person with a public offense. Pen. Code, § 682, provides that every public offense must be prosecuted by indictment or information, except offenses tried in justices' and police courts. Section 872 requires the magistrate, after a defendant has been examined, to hold him to answer if it appears that an offense has been committed, and that he is guilty. Section 883 requires the magistrate, on holding him to answer, to return the warrant and depositions to the clerk. Section 809 provides that, when so held, defendant must be proceeded against by information or indictment. Section 1426 provides that all proceedings in actions before a justice's or police court, for a public offense of which they have jurisdiction, must be commenced by complaint under oath, etc.: Held, that a "presentment" by a grand jury is unauthorized.—IN RE GROSBOIS, Cal., 42 Pac. Rep. 444.

66. CRIMINAL LAW—Prior Conviction.—Pen. Code, § 1093, provides that, in cases where the indictment charges a previous conviction, and defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction: Held, that it was error to admit testimony tending to show a previous conviction, defendant having confessed the same.—PEOPLE v. THOMAS, Cal., 42 Pac. Rep. 456.

67. CRIMINAL LAW—Rape.—The word "abuse," in the sense in which it is used in section 12 of the Criminal Code, is synonymous with the word "ravish."—CHAMBERS v. STATE, Neb., 64 N. W. Rep. 1078.

68. CRIMINAL LAW — Remarks of Counsel. — On trial for murder, comment by the district attorney on the prevalence of stabbing affrays in the city, with allusions to their similarity to the case at bar, is not ground for reversal, where it was made in reply to similar comment by defendant's attorney, and the court, in a charge, instructed the jury to disregard it.—BAROZYNSKI v. STATE, Wis., 64 N. W. Rep. 1026.

69. CRIMINAL TRIAL—Juror — Competency.—One who has formed an opinion of the guilt of accused but states that he can try the case uninfluenced by his opinion, is not incompetent as a juror because he has talked with a witness; it not appearing that he got his opinion from talking with the witness.—WADE v. STATE, Tex., 32 S. W. Rep. 772.

70. DEATH BY WRONGFUL ACT —Corporation. — Rev. St. art. 2899, authorizing an action for death caused by "the wrongful act, negligence, unskillfulness, or default of another," gives a right of action against a private corporation.—LYNCH v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Tex., 32 S. W. Rep. 776.

71. DEED—Bona Fide Purchaser — Constructive Notice.—A person who has knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and fails to make such inquiry, cannot claim protection as a *bona fide* purchaser under the recording act.—DORAN v. DAZEY, N. Dak., 64 N. W. Rep. 1023.

72. DEED—Conveyance to Several.—Code 1892, § 2441 (Code 1871, § 2301), provides that all conveyances of lands to two or more persons shall be construed to create estates in common, unless it appears that it was intended to create an estate in joint tenancy: Held, that a conveyance of land to three persons for their natural lives, and at their death to descendants of their bodies in fee, but, if they have none, to the heirs of their brothers and sisters in fee, createda

tenancy in common, whereby the estate of each tenant at her death passed to her heirs, until the last tenant dies, when the ulterior limitation will take effect.—HAWKINS v. HAWKINS, Miss., 18 South. Rep. 479.

73. DEED—Description.—A deed described the land conveyed as all of a certain farm composed of a tract called the "M" and one called the "P," "the interest intended to be conveyed thereby being the entire interest and estate" received by will from S "and which said farm is particularly described in a deed from P:" Held, that the deed did not convey a tract received by will from S, which was not included in the deed from P, and which was a separate tract from either the M or the P.—JAY v. MICHAEL, Md., 33 Atl. Rep. 322.

74. DEED—Infant.—Rev. St. 1894, §§ 3364, 3365, providing that restoration of the purchase money must be made to avoid the conveyance of an infant *feme covert*, in which her husband, being of full age, has joined, or to avoid the conveyance of an infant who falsely represents himself to be of age, do not require an offer to restore the purchase price, where it was alleged that the husband was not of full age, and the facts pleaded did not disclose any representation by the infant as to age.—GILLENWATER v. CAMPBELL, Ind., 41 N. E. Rep. 1041.

75. DEED—Recital.—A recital in a deed to the effect that the grantees were the only heirs of a certain person did not bind others whom the evidence indisputably showed were also heirs.—MARIPOSA LAND & CATTLE CO. v. SILLIMAN, Tex., 32 S. W. Rep. 843.

76. DEPOSITION—Formal Defect—Waiver.—A stipulation as to the taking of a deposition that "all formalities are expressly waived" waives a defect consisting in a signing by the witness at a place other than at the close of the deposition, though a statute requires such deposition to be subscribed by the witness, where it appears from the notary's certificate that the witness read and swore to the whole deposition.—CHIPLEY v. GREEN, Colo., 42 Pac. Rep. 498.

77. DESCENT AND DISTRIBUTION—Discovery of Will.—Twenty years after the distribution to the heirs at law of the estate of a supposed intestate, his will was discovered. There was no claim that it could have been earlier found: Held, that the statute of limitations to recover from a distributee, who was not a legatee, the amount handed over to him, did not begin to run until the discovery of the will.—CRAUFORD'S ADM'R v. SMITH'S EX'R., Va., 23 S. E. Rep. 235.

78. DIVORCE — Pleading.—In a suit for divorce the allegation that the husband has been guilty of adultery on many occasions, is too general, and, although the name of the person with whom the defendant committed adultery need not be pleaded, the time, place, and circumstances should be set forth.—MILLER v. MILLER, Va., 23 S. E. Rep. 232.

79. DRAINAGE—Parol License—Revocation.—The fact that an executed parol license to use another's land was based on a valuable consideration will not render it irrevocable.—THOEMKE v. FIEDLER, Wis., 64 N. W. Rep. 1030.

80. EJECTMENT—Equitable Defense.—In ejectment, a claim by defendant of title under an unregistered deed, which has been lost, is an equitable defense, and to be available must be set up by answer as a defense in a court of equity.—WILSON v. WILSON, N. Car., 23 S. E. Rep. 272.

81. EJECTMENT BY MORTGAGEE.—The mortgagee in a mortgage of the statutory form, in which the mortgagor "mortgages and warrants" the land, may maintain ejectment against third persons after condition broken and before foreclosure sale.—ESKER v. HEFFERNAN, Ill., 41 N. E. Rep. 1113.

82. ELECTION — Australian Ballot Law.—Under the statute requiring voters to mark a cross in the square opposite the name of the candidate of their choice, a ballot in which are marked in the square two lines which do not cross should not be counted.—APPLE v. BARCROFT, Ill., 41 N. E. Rep. 1116.

83. EQUITY—Excessive Rate of Interest.—Under Civ. Code, § 1918, providing that parties may contract in writing for the payment of any rate of interest, equity will not relieve one who has contracted to pay interest largely in excess of the current rates, in the absence of accident, mistake, actual fraud, or undue influence.—BOYCE v. FISK, Cal., 42 Pac. Rep. 473.

84. EQUITY—Injunction.—Where a bill for injunction against threatened trespasses to land alleges the defendant's insolvency as the reason why the remedy at law is inadequate, evidence of defendant's solvency deprives the court of jurisdiction.—HARMS v. JACOBS, Ill., 41 N. E. Rep. 1071.

85. EQUITY—Removing Executed Contract — Mutual Mistake.—Equity will not reform an executed contract on the ground of mistake unless the mistake is shown to have been mutual.—DOUGHERTY v. GREENWICH INS. CO. OF THE CITY OF NEW YORK, N. J., 33 Atl. Rep. 296.

86. ESTATES — Contingent Remainder.—A man conveyed land to trustees in trust to collect the rents, and pay same to his wife, and directed that at her death the trustees should sell the land, "and divide the proceeds equally among the children" of said grantor and his said wife: Held, that the children took no interest in the land, and that their interest in its proceeds was contingent on their surviving their mother.—STRODE v. MCCORMICK, Ill., 41 N. E. Rep. 109.

87. ESTOPPEL — Against Married Woman.—The fact that a married woman, who executed with her husband, to secure a debt of the husband, a mortgage on land owned by her and him as tenants by entireties, knew that the mortgage as to her was invalid, and took no steps to notify the mortgagee of her interest in the land, will not estop her from denying the absolute ownership of the husband in it.—COATS v. GORDON, Ind., 41 N. E. Rep. 1044.

88. EVIDENCE—Account—Proof of Entries.—On proof that the person who made the entries in an open account was outside the State, proof of his handwriting was admissible as *prima facie* evidence of the truth of the entries.—HEISKELL v. ROLLINS, Md., 33 Atl. Rep. 263.

89. EVIDENCE—Impeaching Evidence.—Impeaching evidence should be limited to the weight and credibility of that which it was introduced to impeach.—SPIARS v. DALLAS COTTON MILLS, Tex., 32 S. W. Rep. 777.

90. EVIDENCE—Parol Evidence.—Where an instrument accompanying a deposit in a bank does not undertake to state the terms of the contract under which it is made, parol evidence is admissible to show the contract.—NOWLIN v. FRICHOTT, Tex., 32 S. W. Rep. 531.

91. EVIDENCE—Parol Evidence — Contract.— Where the language of a written instrument applies equally well to more objects than one, parol evidence is admissible to show to which the instrument relates.—PFEIFER v. NATIONAL LIVE STOCK INS. CO., Minn., 64 N. W. Rep. 1018.

92. EVIDENCE—Undue Influence—Deed.—On an issue as to whether a deed was procured from a deceased grantor through undue influence, a witness cannot state that the grantor was one who could not be influenced by "any power on earth," such opinion being an invasion of the province of the jury.—SMITH v. SMITH, N. Car., 23 S. E. Rep. 270.

93. EXECUTION—Recitals.—A recital in a sheriff's return of execution that no fees were paid or tendered to lay off a homestead for the execution of defendant, is *prima facie* evidence of the truth of the statement.—MILLER v. POWERS, N. Car., 23 S. E. Rep. 182.

94. FEDERAL COURTS—Appeal—Sentence of Death—Supersedeas.—When an appeal to the United States Supreme Court by one under sentence of death by a State court from a refusal of an application for *habeas corpus* is dismissed, and final judgment is entered, and the mandate is issued, the State authorities may pro-

ceed with the execution of the sentence, though the mandate is delivered to them instead of to the Circuit Court from which the appeal was taken.—LAMBERT v. BARRETT, U. S. S. C., 16 S. C. Rep. 135.

95. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—Act March 3, 1891, authorizes appeals or writs of error from the district or Circuit Courts directly to the Supreme Court in cases of conviction of an infamous crime, and section 6 gives the Circuit Court of Appeals power to review decisions in the Circuit or District Courts in cases not provided for by the preceding section, and in terms makes its judgments final in criminal cases: Held, that the decisions of the Circuit Courts of Appeals are not final in cases of infamous crimes.—FOLSOM v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 222.

96. FEDERAL COURTS—Jurisdiction of Circuit Courts of Appeals.—The Circuit Courts of Appeal have no jurisdiction to entertain an appeal in which the only question at issue is as to the jurisdiction of the court below over the cause.—THE ALLIANCE, U. S. C. C. of App., 70 Fed. Rep. 273.

97. FEDERAL COURTS—Supreme Court.—A decision by a State Supreme Court that the holder of a mining claim had no right to appropriate gold at the intersection of two veins is not reviewable by the United States Supreme Court as presenting a federal question involving the application of Rev. St. §§ 2322, 2336, when the State court based its decision on the ground that such holder was estoped, by a deed previously made by him, to claim the gold at such point of intersection.—GILLIS v. STINCHFIELD, U. S. S. C., 16 S. C. Rep. 131.

98. FEDERAL COURTS—Township Bonds—Decision of State Court.—Bonds issued by a township under authority of acts passed in 1882 and 1885 were purchased by plaintiff in 1886, in reliance on their validity; such bonds being then treated as valid by the township, the public, and the different departments of the State, and decisions of the Supreme Court of the State having apparently assumed their validity. In 1888 the State Supreme Court, by a majority of two to one, held the bonds to be invalid. In 1889 the same court affirmed the constitutionality of an act passed December 22, 1888, declaring bonds previously issued by a township to be valid,—a decision apparently in conflict with the previous one: Held, that the Supreme Court, in determining the validity of the plaintiff's bonds, would not be bound by the decision rendered in 1888 by the State Supreme Court.—FOLSOM v. TOWNSHIP NINETY-SIX, ABBEVILLE, U. S. S. C., 16 S. C. Rep. 174.

99. FEDERAL OFFENSE—Robbery of Mails—Fictitious Letter.—A letter addressed to a fictitious person, known to be such, is a "letter" within the meaning of Rev. St. §§ 5467, 5469, making the stealing of a letter from the mail or post-office a penal offense.—GOODE v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 136.

100. FRAUD—Relief.—Neither law nor equity will aid a party to a fraudulent transaction, though he has suffered as a result of the fraud.—LEACH v. DEVEREUX, Tex., 32 S. W. Rep. 837.

101. FRAUDS, STATUTE OF. — Where there was an agreement between defendant bank and a dealer in hay, whereby the bank was to collect for the sales of hay, and from the proceeds pay checks given by the dealer for the purchase price thereof, and such agreement was communicated by the bank to plaintiff, who, relying thereon, sold hay to said dealer, the transaction was not within the statute of frauds, as a verbal promise to answer for the debt of another.—WILLS v. BANK OF NEVADA, Nev., 42 Pac. Rep. 490.

102. FRAUDS, STATUTE OF—Trusts.—A verbal statement by a purchaser of land at foreclosure sale, that he buys it for the benefit of another, is ineffective, under the statute of frauds, to create a trust in favor of the latter.—MCDEARMON v. BURNHAM, Ill., 41 N. E. Rep. 1094.

103. FRAUDULENT CONVEYANCES.— A transfer by a corporation of all its property to another corporation in consideration of the assumption by the latter of the former's debts, and the issuance of stock of the grantee to the grantor, which is carried out by the delivery of such stock to individual stockholders of the grantor, so that they could, if they saw fit, divide it among themselves, instead of applying it to payment of debts, is *prima facie* fraudulent as to creditors of the grantor.—COUSE v. COLUMBIA POWDER MANUF'G CO., N. J., 33 Atl. Rep. 297.

104. FRAUDULENT CONVEYANCE—Action to set Aside.—Where an assignor of a claim might have sued to set aside as fraudulent a conveyance by the debtor, the assignee may do so.—EMMONS v. BARTON, Cal., 42 Pac. Rep. 303.

105. GARNISHMENT — Issue for the Court. — On the issue in garnishment as to whether the garnishee was indebted to the principal defendant at the time the former was served, the parties are not entitled to a jury trial as a matter of right.—DELANEY v. HARTWIG, Wis., 64 N. W. Rep. 1035.

106. GIFTS OF HUSBAND IN FRAUD OF WIFE.—Subject to certain limitations not applicable to this case, and as against any post-mortem claim of his widow, a married man, in Illinois or in Kansas, may, during coverture, give away to his children absolutely the bulk of his property, when the known effect of the gift will be to deprive the widow of the fair share of the property which otherwise would have fallen to her.—SMALL v. SMALL, Kan., 42 Pac. Rep. 323.

107. GUARDIAN OF INFANT—Appointment.—Civ. Code, § 203, declaring that abuse of parental authority is the subject of judicial cognizance in a civil action, and, when the abuse is established, the child may be freed from dominion of the parent, and the duty of support and education enforced, does not limit the authority to appoint a guardian on petition to the superior court, as provided by Code Civ. Proc. § 1747.—EX PARTE MILLER, Cal., 42 Pac. Rep. 428.

108. HABEAS CORPUS—Jury Trial.—The refusal of the court to grant a jury trial on a prosecution for a misdemeanor cannot be reviewed on *habeas corpus*.—IN RE FIFE, Cal., 42 Pac. Rep. 299.

109. HOMESTEAD — Extension of City Limits. — The mere extension of the corporate limits of a city, without defendant's consent, so as to include part of several tracts constituting his rural homestead, little or nothing being done to change the rural character of the property, will not affect defendant's homestead.—NEELEY v. CASE, Tex., 32 S. W. Rep. 785.

110. HUSBAND AND WIFE—Community Property.—In a suit against a wife, as survivor of her husband, to foreclose a mortgage on community property, it was not necessary to prove that community property came into her hands as such survivor, as the judgment does not bind her if she has no such property.—BONNELL v. PRINCE, Tex., 32 S. W. Rep. 855.

111. INJUNCTION—Electric Railroad on Highway.—A person whose land is subject to the servitude of a public highway is not entitled to a preliminary injunction to restrain the construction of an electric railroad on such way, merely because defendant is proceeding without legal authority, but must show, either that the proposed railroad will impose an additional servitude on his land, or that he will suffer some special injury.—BORDEN v. ATLANTIC HIGHLANDS, R. B. & L. B. ELECTRIC RY. CO., N. J., 33 Atl. Rep. 276.

112. INSURANCE—Proofs of Loss.—When proofs of loss are furnished, and a negotiation follows between the assured and insurer, ended by a disagreement as to the basis for the adjustment of the loss, it will be no defense to a suit on the policy that plans and specifications were not furnished by the insured; it being apparent that if furnished there would have been no solution of the difference, and suit was inevitable.—MONTELEONE v. ROYAL INS. CO. OF LIVERPOOL & LONDON, La., 18 South. Rep. 472.

113. INSURANCE POLICY — Warranties.—In an action on an insurance policy, plaintiff, to make out a *prima facie* case, need not negative his failure to comply with

all the stipulations of the policy.—PHOENIX ASSUR. CO. OF LONDON, ENGLAND v. COFFMAN, Tex., 32 S. W. Rep. 810.

114. INTOXICATING LIQUORS—Illegal Sale—Evidence.—Where a defendant is charged with the unlawful sale of intoxicating liquor and with maintaining a common nuisance by keeping a place where liquors are unlawfully sold, and the evidence shows that certain sales were made at the defendant's place of business by another person, and in the absence of the defendant, there must be sufficient competent evidence to establish the fact that such sales were made by some clerk, agent, or employee of the defendant with the knowledge or consent of the defendant, in order to sustain a conviction.—STATE v. BEAM, Kan., 42 Pac. Rep. 394.

115. JUDGMENT.—The fact that a judgment entered on compromise by the parties contained an agreement that, if defendant would file within a certain time secured notes equal in amount to the amount of the judgment, plaintiff would satisfy the judgment of record, does not render the judgment conditional.—NIMOCKS v. POPE, N. Car., 23 S. E. Rep. 269.

116. JUDGMENT—Collateral Attack.—Where the record of a justice of the peace shows jurisdiction of the subject matter and of the parties, and he renders a judgment in a proceeding had before him after acquiring such jurisdiction, such judgment cannot be questioned or set aside in a collateral proceeding.—VINCENT v. DAVIDSON, Kan., 42 Pac. Rep. 390.

117. JUDGMENTS—Confession.—A judgment confessed on a bond without action is void for failure of defendant's statement to allege that the debt is "justly due," as required by Code, § 571. An allegation of the consideration for the bond, as also required by the section, is insufficient.—SMITH v. SMITH, N. Car., 23 S. E. Rep. 270.

118. JUDGMENT—Payment in Gold Coin. — Where a judgment rendered by default in another State recites that it is payable in gold, when there is nothing in the pleadings showing any contract to pay in gold, such judgment is valid only for the amount it finds due payable in any legal tender.—BELFORD v. WOODWARD, Ill., 41 N. E. Rep. 1097.

119. JUDGMENT LIEN—Dramshop Act.—Under Rev. St. 1893, ch. 48, § 10, which declares that for the payment of any judgment that may be recovered against any person in consequence of the sale of intoxicating liquors the property of such person, of every kind, except such as may be exempt, shall be liable, such a judgment is not a paramount lien to a mortgage upon the building in which the liquor was sold, where the mortgage was executed and recorded before rendition of the judgment.—BELL v. CASSEM, Ill., 41 N. E. Rep. 1089.

120. JUDGMENT LIEN—Priorities.—Under Code, § 435, making a judgment, when docketed, a lien on realty subsequently acquired, previously docketed judgments take *pro rata* the after-acquired lands of the judgment debtor, and not by their priorities according to the dates when docketed.—MOORE v. JORDAN, N. Car., 23 S. E. Rep. 259.

121. LANDLORD AND TENANT—Distress.—In an action by a tenant against his landlord for wrongful distress it appeared that plaintiff, who was to pay as rent a fourth of the cotton raised on the premises, called at defendant's house to ask him where he should deliver his portion of the cotton, and defendant ordered him off his place; that defendant, when again asked where the cotton should be delivered, told plaintiff that he had nothing to say to him. Plaintiff afterwards removed three bales of cotton from the rented premises, leaving one on the land: Held, that defendant was authorized in seizing for his rents the cotton removed.—HOLT v. MILLER, Tex., 32 S. W. Rep. 823.

122. LANDLORD AND TENANT—Eviction.—If a tenant holding over after the expiration of his term be evicted by force by his landlord, an action of trespass is one of his legal remedies.—THIEL v. BULL FERRY LAND CO., N. J., 33 Atl. Rep. 281.

123. LANDLORD AND TENANT—Tenants at Sufferance.—Tenants holding over after the expiration of a lease for a fixed term of years are strictly tenants at sufferance, though the lessors may treat them either as trespassers or tenants from year to year, or, by permitting the holding over to run on, may turn the tenancy into one at will.—WILLIAMS v. LADEW, Penn., 33 Atl. Rep. 329.

124. LIFE INSURANCE — Notice of Assessments. — Where the by laws of a mutual insurance company provide that failure to pay assessments within 30 days from date of mailing notice of same to his address forfeits the policy, such a failure to pay is fatal, where a notice is sent, but never received by the assured.—SURVICK v. VALLEY MUT. LIFE ASS'N, Va., 23 S. E. Rep. 223.

125. LIMITATIONS.—Where the bill in a suit to recover a tract of land disclaims a tract lying within it, and covered by a grant issued on a certain entry, an amendment striking out such disclaimer, and disclaiming other land covered by another entry, though made on the ground of clerical error of the draftsman of the original bill, introduces a new cause of action, and does not relate back to the date of the original, but takes effect, so far as the question of limitation is concerned, as of the time it is made.—EAST TENNESSEE IRON & COAL CO. v. BROYLES' HEIRS, Tenn., 32 S. W. Rep. 761.

126. MANDAMUS TO JUDGE.—A district judge may be required by *mandamus* to hear a petition for the enlargement of the city limits under section 121 of the act to incorporate cities of the second class, as amended Gen. St. 1889, par. 884.—CITY OF EMPORIA v. RANDOLPH, Kan., 42 Pac. Rep. 376.

127. MARRIAGE — Breach of Marriage Promise.—In an action for breach of marriage promise, plaintiff need not allege or prove her capacity to enter into the marriage contract, as such capacity will be presumed.—TUCKER v. HYATT, Ind., 41 N. E. Rep. 1047.

128. MARRIAGE—Validity—Law.—A marriage in a foreign State, proved only by general reputation, if valid there is valid in Maryland, in the absence of a law positively prohibiting it.—JACKSON v. JACKSON, Md., 33 Atl. Rep. 317.

129. MARRIAGE SETTLEMENT—Consideration.—A deed in consideration of a marriage to be solemnized is founded on a valuable consideration, and it cannot be assailed by the grantor's creditors.—BUMGARDNER v. HARRIS, Va., 23 S. E. Rep. 229.

130. MARRIED WOMEN — Separate Estate.—A writing by a married woman, engaged in a business managed by her husband, "that for the purpose of establishing my credit, and as a basis therefore, I make the following statement, which shall apply to all future purchases," in which a schedule of his separate property is set out, is an agreement to charge her separate estate for future purchases from the person to whom the statement was made.—BATES v. SULTAN, N. Car., 23 S. E. Rep. 261.

131. MARRIED WOMAN—Wife's Separate Estate.—Money which a husband has permitted his wife to accumulate, by raising and selling pigs, chickens, etc., and to use, not requiring her to account for it, and losing sight of it for 18 months after she has invested it in real estate, is separate estate.—SNODGRASS v. HYDER, Tenn., 32 S. W. Rep. 764.

132. MASTER AND SERVANT.—One constructing a building by employing a contractor with his employees to do the carpenter work, paying the wages of such employees to the contractor, but keeping, himself, the control and management of it, becomes a master of such employees.—DEHORITY v. WHITCOMB, Ind., 41 N. E. Rep. 1059.

133. MASTER AND SERVANT — Injury — Contributory Negligence.—Const. 1890, § 193, in providing that knowledge by an employee of defects in machinery shall not bar a recovery by him for injuries caused by such de-

fects, does not preclude such knowledge, as a fact controlling the degree of care to be exercised by the employee under the circumstances, from being admissible to show contributory negligence.—BUCKNER v. RICHMOND & D. R. CO., Miss., 18 South. Rep. 448.

134. MASTER AND SERVANT—Negligence.—In an action by an employee against his employer for injury caused by an explosion of a barrel of paint containing benzine, it appeared that the barrel had taken fire, and while plaintiff and others, at the request of defendant's foreman, were endeavoring to extinguish the flames the explosion took place, and that such paint was of common and necessary use in defendant's business: Held, that plaintiff could not recover.—BURKE v. PARKER, Mich., 64 N. W. Rep. 1065.

135. MASTER AND SERVANT—Safe Place to Work.—In an action by a servant against his employer for injuries from the explosion of powder stored in a room in which he was operating a forge in the performance of his duties, where it was in question whether plaintiff had been informed of the presence of the powder, an instruction that if plaintiff by negligence brought about his injury, and that if, before he went into the house where the powder was, he had been notified by defendant of its presence, or that, if plaintiff knew it was there, and he voluntarily exposed himself, and was in consequence injured, he could not recover, is without error.—DOWNEY v. PENCE, Ky., 32 S. W. Rep. 737.

136. MECHANICS' LIENS — Petition.—In an action to enforce a mechanic's lien, which accrued under a contract with a decedent while he was the owner of the land, a demurrer to the petition for failure to show why the personal representatives and heirs of decedent were not necessary parties is properly overruled, where demurrant's answer shows that neither the representative nor the heirs of decedent have any interest in the property, the land having been sold under a deed of trust prior to the commencement of the action.—SECURITY MORTGAGE & TRUST CO. v. CARUTHERS, Tex., 32 S. W. Rep. 887.

137. MECHANICS' LIENS — Rights of Subcontractor.—Where a lien statement filed by a subcontractor alleges that two persons are the owners of the real estate sought to be affected by said lien, and the petition filed to enforce said lien makes the same allegation, and seeks to establish a lien upon all the real estate named therein for the total sum claimed to be due from the original contractor for material furnished, and it appears from an agreed statement of facts upon which the case was tried that the two persons so named were not the sole owners, but that the premises were owned by such two persons and another, who was not named either in the lien statement filed or in the petition to enforce the same, held that, under such a state of facts and such pleadings, the subcontractor is not entitled to a lien for a proportionate share of his claim upon the undivided interest of the premises named in his statement and petition.—F. A. DREW GLASS CO. v. EAGLE MILL CO., Kan., 42 Pac. Rep. 387.

138. MECHANIC'S LIEN — Time of Filing.—Code Civ. Proc. § 1183, provides that work done or materials furnished by any but the original contractor under a contract void for want of filing shall be deemed to have been done or furnished at the personal instance of the owner, and that the value thereof shall be a lien. Section 1187 requires every person but the original contractor to file his claim within 30 days after the completion of the building: Held, that the filing of a lien under such implied contract with the owner, prior to the completion of the building, was premature, and that the lien was not enforceable.—DAVIS v. MACDONOUGH, Cal., 42 Pac. Rep. 450.

139. MINING CLAIM — Authority of Agent.—An agent or attorney in fact may locate a mining claim for his principal, and may do everything necessary to perfect such location, including the making of the affidavit required by section 3104, Rev. St.—DUNLAP v. PATTISON, Idaho, 42 Pac. Rep. 504.

140. MORTGAGE.—A mortgage on land previously purchased by plaintiff from her father, but standing in the father's name, executed by the father, without plaintiff's knowledge, to defendant, who knew at the time that the land had been sold to plaintiff, that part of the price had been paid, and that possession had been taken under claim of title, is void as against plaintiff.—GORE v. CONDON, Md., 33 Atl. Rep. 261.

141. MORTGAGE — Parol. — An agreement whereby plaintiff conveyed certain land to defendant in consideration that defendant would assume the payment of certain indebtedness owed by plaintiff, and, upon repayment by plaintiff within 10 years of the amounts so paid, with interest, defendant was to reconvey the land, constitutes a mortgage, which may be shown by parol.—LOEB v. MCALISTER, Ind., 41 N. E. Rep. 1061.

142. MORTGAGE — Sale under Power — Injunction.—A sale under a power in a mortgage given to secure bonds of the mortgagor will not be enjoined till the mortgagor can obtain adjudication on unliquidated and disputed claims against the bondholder, his title to the bonds being absolute.—NATIONAL RUBBER CO. v. RHODE ISLAND HOSPITAL TRUST CO., R. I., 33 Atl. Rep. 254.

143. MORTGAGE DEBT — Waiving Security. — Where a mortgage on its face purports to secure a note, the mortgagee cannot release the security, and maintain an action on the note.—HIBERNIA SAVINGS & LOAN SOC. v. THORNTON, Cal., 42 Pac. Rep. 447.

144. MUNICIPAL CORPORATION. — An information by the attorney general will not lie to compel municipal officers to repay into the city treasury moneys unlawfully taken therefrom. — ELLIS v. CITY OF DETROIT, Mich., 64 N. W. Rep. 1057.

145. MUNICIPAL CORPORATIONS—Defective Sidewalk—Injuries.—One who has knowledge of the defective condition of a sidewalk before going upon it in the dark is required to exercise more care than if he were ignorant of the defect, or if there were no defect, and it were daylight.—CITY OF BEDFORD v. NEAL, Ind., 41 N. E. Rep. 1029.

146. MUNICIPAL CORPORATIONS — Defective Streets.—Where the construction and maintenance of waterworks of a city are by statute vested in an independent commission, the city will not be liable for injuries from defects in the street due to negligence of its own, or the servants employed by the commission, in laying the pipes.—GROSS v. CITY OF PORTSMOUTH, N. H., 33 Atl. Rep. 256.

147. MUNICIPAL CORPORATION—Estoppel—Injuries.—Where an action is begun against a city, and it is described in the petition as a municipal corporation organized under the laws of the State, and the officers of the city, in response to the summons, make a general appearance for the city, and ask for affirmative relief, it cannot afterwards deny its corporate existence, and proof of the same by the plaintiff is unnecessary.—CITY OF ERIE v. PHELPS, Kan., 42 Pac. Rep. 336.

148. MUNICIPAL CORPORATIONS— Indebtedness—Contract for Lighting.—Where a municipal corporation contracts for water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, within the meaning of Acts 1891, p. 389, since the debt for each year does not come into existence until the compensation for each year has been earned.—FOLAND v. TOWN OF FRANKTON, Ind., 41 N. E. Rep. 1031.

149. MUNICIPAL CORPORATION—Payment of City Warrants.—Every lawfully issued and valid municipal warrant should be paid in the order of its registration for payment, although the same was issued in payment of an indebtedness of a prior year.—STATE v. CAMPBELL, S. Dak., 64 N. W. Rep. 1025.

150. MUNICIPAL CORPORATION—Regulating Construction of Building by Ordinance.—An ordinance requiring that "any owner or contractor who shall build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a

roofed passageway to be built in front of the building, on the sidewalk, is reasonable.—SMITH v. MILWAUKEE BUILDERS' & TRADERS' EXCHANGE, Wis., 64 N. W. Rep. 1041.

151. MUNICIPAL CORPORATIONS—Regulating Price of Gas.—Rev. St. 1894, § 4306, authorizes a municipal corporation to enact an ordinance regulating the supply and distribution of natural gas, and exacting a fee from companies using its streets in supplying it: Held, that where a city passed an ordinance granting the right to lay natural gas mains in its streets, prescribing the maximum price to be charged, and requiring an approved bond that a company accepting such privilege would comply with the ordinance, the price fixed by the ordinance is binding on the company whose bond has been presented to and accepted by the city, and in whose favor the city has waived its right to exact a fee for the use of its streets.—WESTFIELD GAS & MILLING CO. v. MENDENHALL, Ind., 41 N. E. Rep. 1033.

152. MUNICIPAL OFFICERS—Fixing Salaries.—A council empowered to fix the compensation of municipal officers, provided only that the salary of no officer shall be diminished during the term for which he is elected or appointed, may, after appointment of an officer, but before commencement of his term, fix his salary at less than the amount received by the incumbent for the preceding term. — WESCH v. COMMON COUNCIL OF CITY OF DETROIT, Mich., 64 N. W. Rep. 1051.

153. NATIONAL BANKS — Receiving Usurious Interest. —Following the decisions of the Supreme Court of the United States, it was held that usurious interest paid a national bank on a note cannot be applied by way of set-off of payment against the principal sum due in any suit by the bank upon such note.—NORFOLK NAT. BANK v. SCHWENK, Neb., 64 N. W. Rep. 1073.

154. NEGLIGENCE — Imputed Negligence.—Parents' negligence in failing to procure medical aid after an injury cannot be imputed to a child of tender years in a suit by the child for its own benefit.—TEXAS & P. RY. CO. v. BECKWORTH, Tex., 32 S. W. Rep. 809.

155. NEGLIGENCE—Injury to Trespassing Child.—An owner of land who knows or might reasonably have expected that children would play thereon will not be liable for injury to a trespassing child from the falling of a pile of lumber if in piling it he has used the care which a reasonably prudent person under like circumstances would have used, though the construction of the pile might in fact be dangerous to children climbing thereon.—MISSOURI K. & T. RY. CO. OF TEXAS v. EDWARDS, Tex., 32 S. W. Rep. 815.

156. NEGLIGENCE — Reservoir — Negligent Construction.—A waterworks company is liable for the damages proximately resulting from the fall of a water tower negligently constructed on its own premises.—RIGDON v. TEMPLE WATERWORKS CO., Tex., 32 S. W. Rep. 828.

157. NEGOTIABLE INSTRUMENTS — Accommodation Paper—Consideration.—It matters not that an accommodation maker affixed his signature to the note in question after the bank discounting it as payee had paid the money thereon to his comaker, for whose benefit the note was executed, if, before such comaker received the money, he promised the bank that he would cause the accommodation maker to sign the note, and the bank advanced the money relying in good faith upon that promise, not entering the note as discounted until after the other signature was obtained.—PAULY v. MURRAY, Cal., 42 Pac. Rep. 313.

158. NEGOTIABLE INSTRUMENT—Note—Defense.—In an action on a note for the price of a harvester, a subsequent contract pleaded by defendant in avoidance, whereby the payees were to extend the time of payment until the next harvest, and put the machine in working order, cannot be shown on plaintiff's cross-examination.—HAINES v. SNEDIGAR, Cal., 42 Pac. Rep. 462.

159. NEGOTIABLE INSTRUMENT—Note — Assignment.—An indorsement of a non-negotiable note by the payee, accompanied by delivery, operates as an assignment. —MERCHANTS' NAT. BANK OF BATTLE CREEK v. GREGG, Mich., 64 N. W. Rep. 1052.

160. NEGOTIABLE INSTRUMENT—Promissory Note.—Evidence that the deceased was "a man of property," and had money "loaned out" when he died, is not competent to disprove his execution of a note, particularly as it was not shown that at any time from the execution of the note to his death deceased had money on hand.—PETTIFORD v. MAYO, N. Car., 23 S. E. Rep. 252.

161. NUISANCE.—A riparian lot owner, by the maintenance by a city of a cesspool on a stream above his lot, which, besides being offensive to all persons living in the neighborhood, causes, when the cesspool is flushed, offensive sewerage matter to be deposited on his lot, suffers a special injury, entitling him to sue to abate the nuisance.—LIND v. CITY OF SAN LUIS OBISPO, Cal., 42 Pac. Rep. 437.

162. NUISANCE — Liability for Erection.—Where an owner of land, in possession thereof, consents to and authorizes the erection thereon by a third party of a structure which creates or constitutes a nuisance, he is as liable for the consequences as if he had erected the structure himself.—SIMPSON v. STILLWATER WATER CO., Minn., 64 N. W. Rep. 1144.

163. OFFICE AND OFFICER—Treasurer—Official Bond. —The sureties on the bond of a city treasurer, conditioned for the discharge of the duties of the office and the delivery to his successor of property which he should hold as such officer, are not liable for moneys of the sinking fund, of which he is custodian, subject to the order of the sinking-fund commissioners, where, without the knowledge of the sureties, the commissioners, under their power to invest it subject to the approval of the council, loan it to him as a banker; and it is immaterial that the steps taken by the commissioners and council before making the loan were not strictly formal.—CITY OF WILKES BARRE v. ROCKAFELLOW, Penn., 33 Atl. Rep. 269.

164. PARTITION—Action by Heir. — Where relief is sought by an alleged heir only as to real estate of which he claims a portion, and no part has been sold for the payment of debts, and no division has been made, such heir may have specific relief as to the property itself, and need not pursue the circuitous remedy of contribution in the the probate court.—SHORTEN v. JUDD, Kan., 42 Pac. Rep. 337.

165. PARTNERSHIP — Death of Partner— Survivors.—The death of one partner does not authorize the surviving member of the firm to bring an action at law on a note discounted by the firm, but executed by the deceased partner to defendant, who indorsed it for the accommodation of the maker; defendant's liability being simply that of a surety.—PATTON v. CARR, N. Car., 23 S. E. Rep. 182.

166. PARTNERSHIP—Individual Debts—Conversion.—The individual members of an insolvent firm cannot convert the partnership estate to the payment of the individual debts of its members, leaving the firm debts unpaid.—JACKSON BANK v. DURFEY, Miss., 18 South. Rep. 456.

167. PARTNERSHIP—Sale of Firm Business—Contract. —When a partnership business, after it has been sold, continues to be carried on in the firm name, a contract within the scope of the firm business, made by a member of the firm with a person who has no knowledge of the change in the ownership of the business, is binding upon the person to whom the business has been sold.—THATCHER v. ALLEN, N. J., 33 Atl. Rep. 284.

168. PLEADING—Res Judicata.— To sustain a plea of *res judicata* it must be alleged and proved that the former judgment pleaded was final.— SOUTHERN RY. CO. v. BRIGMAN, Tenn., 32 S. W. Rep. 762.

169. PLEDGE OF CROPS FOR RENT.—An oral agreement between landlord and tenant that title to crops raised

during the term should remain in the landlord, and that the crop was to be put in warehouse in the landlord's name, and that from a sale thereof the landlord was to retain as rent an amount equal to the rent reserved in the lease, and turn over the balance to the tenant, is merely an agreement, that after the crop was harvested and stored, it should become a pledge for payment of the rent, and does not create a lien which would support an action of conversion against a sheriff for levying on the crop while growing, and seizing it under attachment against the tenant as soon as harvested.—STOCKTON SAVINGS & LOAN SOC. v. PURVIS, Cal., 42 Pac. Rep. 447.

170. PRINCIPAL AND AGENT—Authority of Agent. — The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has.—CREIGHTON v. FINLAYSON, Neb., 64 N. W. Rep. 1103.

171. PRINCIPAL AND AGENT—Notice to Agent as Notice to Principal.—Where one agreed with a firm to purchase sheep for it, and to share in the profits from the sale of the sheep, and afterwards entered into another agreement with another firm, from which he purchased the sheep, by which he and the second firm were to share the profits and losses as partners, it cannot be said, in behalf of the sureties on notes executed by the second firm to the first, to secure the latter for damages suffered by a breach of the contract of sale, for the performance of which the same sureties were bound, that the knowledge of the agent as to his own fraud could be imputed to the purchasing firm.—JUNGK v. REED, Utah, 42 Pac. Rep. 292.

172. PRINCIPAL AND AGENT — Pleading and Proof.—Judgment cannot be had against a principal for the negligent act of his agent on a petition charging the principal with the act without alleging the agency.—PEYTON v. COOK, Tex., 32 S. W. Rep. 781.

173. PRINCIPAL AND AGENT—Ratification—Estoppel.—The mere fact that defendant knew that a physician was treating a third person, at the request of another, on defendant's account, and relied for compensation on defendant, and that it made no objection, does not render it liable to plaintiff for the services, on the ground of ratification.—DEANE v. GRAY BROS. ARTIFICIAL STONE PAVING CO., Cal., 42 Pac. Rep. 443.

174. PROCESS—Service—Motion to Quash.—Objection by a defendant corporation to service of process on the ground that the person served was not in fact its agent should be raised by motion to quash the return.—AMERICAN CEREAL CO. v. ELI PETTIJOHN CEREAL CO., U. S. C. C. (Ill.), 70 Fed. Rep. 276.

175. PROCESS—Service.—In the absence of statutory direction to the contrary, service of process must be by reading, and not by delivery of a copy.—LAW v. GROMMES, Ill., 41 N. E. Rep. 1068.

176. PROCESS—Service.—Under Rev. St. 1893, ch. 110, § 2, which declares that it shall not be lawful, except in local actions, to sue any defendant out of the county where he "resides or may be found," one who is present in a county other than that of his residence, pursuant to a notice to take depositions in a case in which he is interested, may be served with process while taking such depositions, in the absence of any fraud or artifice whereby he was induced to come there.—CASSEM v. GALVIN, Ill., 41 N. E. Rep. 1087.

177. PROCESS—Service.—A resident of a foreign State, while attending a court of this State as a witness, cannot be served with process for the commencement of a civil action against him.—MALLOY v. BREWER, S. Dak., 64 N. W. Rep. 1120.

178. PROCESS—Service on Agent.—A return of service which does not set forth the character of the agent served is presumably good, but may be inquired into, and depositions may be taken, on a motion to set aside the same, and it will be set aside if the presumption of a good service is conclusively rebutted.—FULTON v. COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA, Penn., 33 Atl. Rep. 324.

179. PROHIBITION.—Since an appeal lies from, and is an adequate remedy to prevent execution of, an order of court appointing a receiver of, and directing a sale by him of, property of a plaintiff in a divorce action, to satisfy a judgment of alimony against him, prohibition will not issue for such purpose, though the order is void as in excess of the jurisdiction of the court.—WHITE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 471.

180. PUBLIC LANDS — Bona Fide Purchaser. — The rights of a *bona fide* purchaser from one who has entered timber lands under the act of congress of June 3, 1878, which provides that, for a false statement by the entryman, any grant which he may have made shall be void, except in the hands of a *bona fide* purchaser, are not affected by a subsequent cancellation of the entry for false representations, although at the time of his purchase no patent for the land had been issued.—LEWIS v. SHAW, U. S. C. C. (Wash.), 70 Fed. Rep. 289.

181. PUBLIC LANDS — Estoppel. — Where defendant owning a tract of land, induced plaintiff and his grantors to procure patents to adjoining land, representing the same to be vacant public domain, defendant cannot, on discovering that said land was part of its tract, question the regularity of the proceedings leading up to plaintiff's patent.—NEW YORK & T. LAND CO. v. GARDNER, Tex., 32 S. W. Rep. 786.

182. PUBLIC LANDS — Railroad Rights of Way. — The claim of one who has settled on and improved public lands with the declared intention of obtaining title under the pre-emption laws is a "possessory claim," within the meaning of Act March 3, 1875 (18 Stat. 482), granting to railroads the right of way through the public lands of the United States, and providing that the legislature of the proper territory might provide the method of condemning possessory claims on the public lands.—WASHINGTON & I. R. CO. v. OSBORN, U. S. S. C., 16 S. C. Rep. 219.

183. QUIETING TITLE—Action.—An action to remove cloud on title will not lie in favor of one alleging perfect legal and equitable title against one attaching it as the property of another.— HEATH v. FIRST NAT. BANK OF CLEBURNE, Tex., 32 S. W. Rep. 778.

184. RAILROAD COMPANY — Crossing— Negligence.—Whether the person who, relying on the custom not to run trains between a depot and a train standing opposite it, discharging express and passengers, is guilty of contributory negligence in going on the intervening track, to get mail and express from the train opposite, without looking to see if another train is approaching, is a question for the jury.—TUBBS v. MICHIGAN CENT. R. CO., Mich., 64 N. W. Rep. 1061.

185. RAILROAD COMPANIES—Death of Fireman—Risks of Employment.—Where a cattle chute is constructed in dangerous proximity to a railroad track, the defect is not one of the risks assumed by a fireman.—NEW YORK, C. & ST. L. R. CO. v. OSTMAN, Ind., 41 N. E. Rep. 1037.

186. RAILROAD COMPANY—Fires—Contributory Negligence.—In an action brought under section 1321, Gen. St. 1889, the defendant is only released from liability on account of the negligence of the plaintiff when there exists a real proximate causal connection between the plaintiff's negligent act and the injury complained of. Hence, where the jury find specially that the plaintiff was negligent in not taking any precaution to protect his property from incursions by prairie fires, but also find that such negligence did not contribute to the setting out of the fire which caused the injury, or to the damages which result therefrom, a judgment in favor of the plaintiff upon such special findings, and a general verdict in favor of the plaintiff will not be disturbed.—UNION PAC. RY. CO. v. EDDY, Kan., 42 Pac. Rep. 413.

187. RAILROAD COMPANIES — Fires—Negligence. — A railroad company is required to use ordinary care in providing the best appliances to prevent the unnecessary escape of fire therefrom, and to use a like degree of care to keep its right of way free from combustible

material, and is only liable for negligence in failing to do this, whether the fire starts on the right of way or beyond it.—GULF, C. & S. F. RY. CO. v. REAGAN, Tex., 32 S. W. Rep. 846.

188. RAILROAD COMPANIES — Injury — Negligence.—Where one is walking on a footpath at the end of the cross-ties along a railroad track, in the daytime, the engineer of a train going in the same direction may reasonably assume that such person will either stay there, or step further from the track, when he sees the train.—MATTHEWS v. ATLANTIC & N. C. R. CO., N. Car., 23 S. E. Rep. 177.

189. RAILROAD COMPANY — Right of Way—Crossing.—A deed of a right of way to a railroad company having provided for a private way on the grantor's farm under the railroad, and the grantor having, with the consent of the company, elected to accept such way over and on a public highway, the company cannot close it without liability for damages.—LAKE ERIE & W. R. CO. v. LEE, Ind., 41 N. E. Rep. 1058.

190. RAILROAD COMPANIES — Right of Way—Damages.—A subsequent purchaser, to whom has been sold the right of his vendor to institute legal proceedings and to recover damages therein for such demands as would have accrued to such vendor, may recover of a rail road company which has occupied the street on which the property abutted without instituting condemnation proceedings or settling with the owners for damages resulting to abutting property.—FREY v. DULUTH, S. S. & A. RY. CO., Wis., 64 N. W. Rep. 1038.

191. RAILROAD COMPANIES—Negligence—Contributory Negligence.—Where an engineer, by the exercise of ordinary care, can see that a human being is lying apparently helpless on the track in front of his engine, in time to stop the train without peril to the persons on the train, the company is liable for any injury resulting from his failure to perform his duty, notwithstanding the previous negligence of the person injured.—PICKETT v. WILMINGTON & W. R. CO., N. Car., 23 S. E. Rep. 264.

192. RAILROAD COMPANY—Negligence of Superintendent—Fellow-servants.—Under Laws 1889, ch. 438, declaring a railroad company liable for damages to an employee caused by the negligence of a "train dispatcher, telegraph operator, superintendent, yard master, conductor or engineer, or of any other employee, who has charge or control of any stationary signal, target point, block or switch," the word "superintendent" applies only to one having to do with the movement of trains and cars, and does not include the foreman of a repair shop.—HARTFORD v. NORTHERN PAC. R. CO., Wis., 64 N. W. Rep. 1033.

193. RECEIVER—Liability for Money Lost.—A member of a firm was appointed receiver in 1861 to collect certain money and have it at the next term of court. He collected the money and deposited it to his firm's account in a bank. For the next five years after his appointment no term of court was held, because of the war. The firm account always had more to its credit than the sum so collected, the members of the firm each having his private account in the same bank. The bank was wrecked by the war, and the money lost: Held, that the receiver was not liable therefor, he having used the same care that a prudent man would have used with his own.—BARTON'S EX'R v. RIDGEWAY'S ADM'R, Va., 23 S. E. Rep. 226.

194. REFEREES—Powers.—A referee cannot, under Code, § 422, authorizing him "to allow amendments to any pleadings," permit a defaulting defendant to file an answer, except by consent.—JONES v. BEAMAN, N. Car., 23 S. E. Rep. 248.

195. RELEASE AND DISCHARGE.—The payment of a less sum in satisfaction of a larger one is no satisfaction.—CHAMBERS v. NIAGARA FIRE INS. CO., N. J., 33 Atl. Rep. 283.

196. RELIGIOUS ASSOCIATION—Removal of Trustees.—A member of a church had such an equitable interest in the property thereof that he may maintain an action for the removal of trustees, who have deprived the church of the use of property held by them in trust in the manner provided by Code, ch. 54; and the judgment may be so framed as to appoint plaintiff a trustee in their place, and to direct a conveyance of the property to him, to be conveyed by him as the church may direct.—NASH v. SUTTON, N. Car., 23 S. E. Rep. 178.

197. RELIGIOUS SOCIETY—Church Litigation.—When a large part of a congregation refuse a pastor regularly sent them by the duly constituted church authorities, and adhere to another pastor, and retain possession of the church property, it is improper to compel them thereafter to deliver to the duly-appointed pastor not only contributions and collections for general church purposes, but also contributions voluntarily made by them for the specific purpose of paying the salary of the pastor to whom they adhered.—BLIEM v. SCHULTZ, Pa., 33 Atl. Rep. 337.

198. REMOVAL OF CAUSES—Jurisdiction.—In an action to annul title to land acquired under a sale decreed by a federal circuit court in a case removed from a State court under Act Cong. March 3, 1875, the petition for removal showed that a citizen of Illinois sued a citizen of the same State, and an alien, but complainant did not set out the bill, cross-bill, and answers in such case: Held, that it did not appear beyond controversy that on the record the federal court could not have had jurisdiction, so as to render such decree void.—GOODSELL v. DELTA & PINE LAND CO., Miss., 18 South. Rep. 452.

199. REPLEVIN — Demand.—The gist of the action of replevin being the wrongful detention, if a person rightfully comes into the possession of personal property of which he is not the owner his possession is not wrongful until a demand is made upon him for a return of it; but if a person comes into the possession of the personal property of another by his own wrong and without the consent of and against the wish of the owner, he is wrongfully in possession of the property, and no demand is necessary.—JORDAN v. JOHNSON, Kan., 42 Pac. Rep. 415.

200. RES JUDICATA.—Where each of two defendants claimed title in himself in an action against them to recover a tract of land, and it was adjudged that one defendant was the owner of a specified portion, and the other defendant of the remaining portion, the judgment is *res judicata* as between defendants themselves and those claiming under them.—BAUGERT v. BLADES, N. Car., 23 S. E. Rep. 179.

201. SALE—Auction Sale — Contract.—Where real estate is sent to sale at public auction under a written advertisement, the intention of the seller as to the object intended to be sold, and of the purchaser as to that intended to be bought, is to be ascertained by the advertisement, and not by conversations or letters written between the parties in prior negotiations for a private sale, which had failed and been abandoned. The advertisement binds both parties.—MAGGINNIS v. UNION OIL CO., La., 18 South. Rep. 459.

202. SALE—Conditional Sale.—An executory agreement for the sale of property on condition that the owner shall not be divested of his title until the price has been paid is valid against third persons, in the absence of fraud.—RODGERS v. BACHMAN, Cal., 42 Pac. Rep. 448.

203. SALE—Conditional Sale—Election of Remedies.—A corporation delivered to E a machine, taking his notes, and also a contract providing that the company did not part with its title until the notes were fully paid; that, should E make default in any of the payments, the company might terminate the contract and take the machine; and that all payments prior to such default should be compensation for its use. After default by E, he died, and the company presented to his administratrix its claim upon the notes for the balance due, and the claim was allowed and approved by the court: Held, that the company waived its right to retake the machine, and elected to treat the transac-

tion as an absolute sale.—HOLT v. MANUF'G CO. v. EWING, Cal., 42 Pac. Rep. 435.

204. SALES—Contract.—Where the buyer refuses to accept goods purchased, in an action by the seller for the contract price, less than the net proceeds of a resale of the goods, he cannot recover damages as for a repudiation of the sale prior to the time of delivery.—HEIDENHEIMER v. CLEVELAND, Tex., 32 S. W. Rep. 826.

205. SALE — Contract—Parol Evidence.— A positive sale, in writing, of personal property, which provides a price which is to be paid, is not varied by a contemporaneous parol contract as to how the price is to be paid, nor as to when the price is to be paid, if the time is in the future.—SLATTEN v. KONRATH, Kan., 42 Pac. Rep. 399.

206. SALE—Vesting of Title—Fixtures.—Where one of the terms of sale of machinery required that the notes for the price be indorsed by a certain person, but there was testimony that said indorsement was to be given merely as "additional security," and the vendee declined to make a contract reserving title to the vendor, the failure to obtain such indorsement did not prevent the passing of title, and the machinery, having been fastened to the mill as a permanent fixture, became subject to a prior vendor's lien on the mill and on the machinery thereafter to be placed therein. —HAZLEHURST LUMBER CO. v. J. A. FAY & EAGAN CO., Miss., 18 South. Rep. 485.

207. SALE OF GOOD :—Ratification.—When a vendor brings an action to recover the price of goods sold, he thereby ratifies the sale, and he cannot afterwards, nor by amendment in the same action, elect to rescind the sale and recover the goods on the ground of the fraud of the vendee.—WACHSMUTH v. SIMS, Tex., 32 S. W. Rep. 821.

208. SALE OF PERSONALTY— Rescission.—A contract by which a boiler maker agrees to deliver and set up boilers of a specified capacity, to be determined by a test made after the boilers are set up, is executory, and may be rescinded by the purchaser if the test fails to show compliance with the contract.— SMITH v. YORK MANUF'G CO., N. J., 33 Atl. Rep. 244.

209. SHERIFFS—Liability. — Where a deputy sheriff employs one as keeper of attached property, and the sheriff acquiesces for a period of 14 months, he cannot thereafter, and after the death of the deputy, repudiate such employment. — CHENOWITH v. CAMERON, Idaho, 42 Pac. Rep. 503.

210. SLANDER—Imputing Unchastity.—Where fornification is not by statute a criminal offense, defamatory language charging it is not actionable *per se*.—LEDLIE v. WALLEN, Mont., 42 Pac. Rep. 289.

211. SPECIFIC PERFORMANCE.—Payment of part of the price, with payment of taxes, and a listing of the land with real estate agents for sale, is not such part performance as will warrant specific performance of such agreement.—HARNEY v. BURHANS, Wis., 64 N. W. Rep. 1031.

212. TAXATION OF BANK STOCK— Injunction. — The shares of stock of an incorporated banking association being, as provided by chapter 14, Laws 1891, assessed against the individual owners thereof, and the tax extended thereon being against and payable by such individual shareholders, and not by the bank, such bank cannot, in its own name, and for itself, maintain an action to restrain the collection of such tax from the individual stock owners.—NORTHWESTERN LOAN & BANKING CO. v. MUGGLI, S. Dak., 64 N. W. Rep. 1122.

213. TAXATION OF STREET RAILROADS—Construction. —A practical construction of a statute by a governmental department, while not of such high authority as a judicial interpretation of the act, is, when not in conflict with the constitution or the plain intent of the act, of great persuasive force and efficacy.—BLOXHAM v. CONSUMERS' ELECTRIC LIGHT & STREET RAILROAD CO., Fla., 18 South. Rep. 444.

214. TAX TITLE.—The effect of a tax sale on the title of the owner of the land is not changed by the fact hat his refusal to pay the taxes assessed on it as part of a certain warrant was based on an honest, though erroneous, belief that it was within another warrant on which he paid the taxes. — WILSON v. MARVIN, Penn., 33 Atl. Rep. 275.

215. TELEGRAPH COMPANY—Failure to Deliver Message.—A telegraph company is liable for its negligent failure to deliver a message to plaintiff informing him of the illness of his brother, and requesting him to come immediately, whereby plaintiff was prevented from seeing his brother before death, it appearing that said message was prompted by mutual affection, though it was also sent to secure plaintiff's services as a nurse.—WESTERN UNION TEL. CO. v. HALE, Tex., 32 S. W. Rep. 814.

216. TELEGRAPH COMPANIES—Government Messages. —Act Cong. July 1, 1862, July 2, 1864, and May 7, 1878, entitled the government to retain and apply on the debt due it by the Union Pacific Railroad Company all sums due for services rendered in its behalf by such company. The railroad company constructed and owned a telegraph line along its road, as did the Western Union Telegraph Company, and by agreement the wires of the railroad company were operated and used by the telegraph company: Held, that the government could not recover sums paid by it on account of government messages delivered to the telegraph company for transmission, on the ground that they in part passed over the wires of the railroad company, there being no evidence that any part of them were sent over such wires rather than over the wires of the telegraph company, nor any requirement in that regard.—UNITED STATES v. WESTERN UNION TEL. CO., U. S. S. C., 16 S. C. Rep. 210.

217. TOWNS—Bridges—Rebuilding.— Where two adjoining towns have by mutual agreement constructed a bridge on a road separating the towns, and the bridge has become worn out, such towns are bound to rebuild such bridge, both at common law and by virtue of Rev. St. 1893, ch. 121, § 21, which declares that bridges over streams on roads on town lines shall be built and repaired at the expense of such towns.—PEOPLE v. COMMISSIONERS OF HIGHWAYS OF TOWN OF DOVER, Ill., 41 N. E. Rep. 1105.

218. TRUSTS—Enforcement in Equity.—Where a bill by one appointed by the court as successor to a deceased trustee under a will, filed to ascertain the amount of the trust estate in the hands of the deceased at his death, shows that the will appointing deceased devised an estate to him in trust to pay the income therefrom to the testator's daughter during her life, and at her death to divide it among her children and grandchildren, and that the daughter is still living complainant's *cestuis que trustent* are not necessary parties, the object of the suit being simply to recover the trust estate from the former trustee's estate.—STEVENS v. BOSCH, N. J., 33 Atl. Rep. 293.

219. TRUSTS—Failure of Trustee to Act.—One who, as trustee, has accepted and proceeded to execute a deed of trust, cannot, by his own act or default, terminate the trust.—NELSON v. RATLIFF, Miss., 18 South. Rep. 487.

220. TROVER — Junior Mortgagee. — Where property was attached and taken from the possession of a first mortgagee on the ground that the first mortgage was fraudulent, but subject to subsequent mortgages, which recognized the validity of the first, and said first mortgagee's demand for the return thereof was refused, but the attachment was afterwards dissolved, and the property returned to the first mortgagee, the junior mortgagees not having any right to the possession thereof, cannot maintain trover against the attaching creditors.—MCGRAW v. SAMPLINER, Mich., 64 N. W. Rep. 1060.

221. TRUSTS — Purchase at Judicial Sale. — A trust is raised where one purchases at judicial sale, having, at the time of bidding or previously, agreed, by parol or otherwise, that he would buy it, and hold it subject to the right of the other to repay the purchase money and

demand a conveyance.—COBB v. EDWARDS, N. Car., 23 S. E. Rep. 241.

222. TRUSTS IN REALTY—An agreement whereby defendant's mother was to convey certain land, purchased with her money, to defendant, said conveyance to take effect on her death, in consideration that he would pay taxes thereon, and support her during her life, is within Civ. Code, § 852, requiring trusts in realty to be in writing.—WITTENBROCK v. CASS, Cal., 42 Pac. Rep. 300.

223. USURY — Foreign Statute — Presumptions. — Although promissory notes bearing on their face a greater rate of interest than 6 per cent. were executed and made payable in the State of Tennessee, and it appeared, by an admission in open court, that the legal rate of interest in that State was 6 per cent., in the absence of any further evidence as to the laws of Tennessee on the subject of usury, the courts of Georgia will not hold that these notes are absolutely void, and will sustain a verdict making a person who guarantied their payment liable for the principal of the notes, with interest thereon at 6 per cent.—CRAVEN v. BATES, Ga., 23 S. E. Rep. 202.

224. VENDOR AND PURCHASER — Conditions of Sale—Waiver.—Where the vendor of land agrees to furnish the vendee an abstract of title within 30 days from the date of sale, which is not done, and the vendee thereafter treats the default as immaterial, and continues to make payments under the contract, and otherwise treats it as still in force, he will be deemed to have waived the performance of that condition, and cannot obtain a rescission, or a recovery of the money advanced, by reason of such default. — MCALPINE v. REICHENEKER, Kan., 42 Pac. Rep. 339.

225. VENDOR AND PURCHASER — Rescission. — Defendant contracted to convey certain land to plaintiff on or before a specified date, "except unavoidably restrained." At the time of such contract defendant had not title to all the land, but had applied for a patent, and had done all in her power to procure it: Held, that defendant's failure to perform her agreement within the specified time was not ground for rescinding the contract.—BURWELL v. SOLLOCK, Tex., 32 S. W. Rep. 844.

226. VENDOR AND VENDEE — Contract — Landlord's Lien.—After default in payments on a contract to convey, an agreement whereby the vendee was to pay rent for the premises is valid, and, though the contract was not abandoned, the crops, under Code, § 1754, are subject to a landlord's lien, but the amount paid for rent must be applied in discharge of the payments due on the contract to convey.—JONES v. JONES, N. Car., 23 S. E. Rep. 214.

227. VENDOR AND VENDEE—Sale of Land—Assumption of Mortgage.—The vendor of land "under and subject to the lien of" a mortgage has no right of action against the purchaser on account of such stipulation until he has actually paid the mortgage debt, or until the land has been withdrawn from the reach of the holder of the mortgage, and the fact that the holder of the mortgage is indebted to the vendor in an amount greater than the mortgage debt is immaterial.—BLOOD v. CREW LEVICK CO., Penn., 33 Atl. Rep. 344.

228. VENDOR'S LIEN — Foreclosure.—In an action by heirs to set aside a sale of the decedent's land under the foreclosure of a vendor's lien, the evidence showed that, prior to the foreclosure sale, the land had been sold under an execution against the decedent: Held that, as the execution sale passed the equity of redemption, is was not error to direct a verdict for the defendants.—RUSSELL v. CAMPBELL, Tex., 32 S. W. Rep. 858.

229. WATERS—Riparian Rights—Injunction.—Injunction does not lie at the instance of a prior appropriator of the water of a river through an irrigation ditch, to restrain a subsequent appropriator further up the stream from diverting water from the river, and, after using it, turning it into complainant's ditch, instead of returning it to the river above the opening of complainant's ditch, where it appears that the water is turned into such ditch above the point where it is to be used by complainant, and that complainant has the same quantity as he would have if defendant returned the part used by him to the river.—AUSTIN v. CHANDLER, Ariz., 42 Pac. Rep. 483.

230. WILL — Devise to Widow.—Testator gave his property to his widow "for her own proper use and behoof as long as she shall remain my widow, and, if she should get married, then she shall be only entitled to the one-third in said property, the balance, being to thirds, to my youngest daughter, K, and, if the said K should die, then I will and bequeath the two-thirds to my son W, and, if both should die, then the residue remaining shall be equally divided among my remaining children: Held, that the whole estate was given to the widow in fee, subject to the condition that she should not marry again, and defeasible as to two thirds upon the breach of that condition.—REDDING v. RICE, Penn., 33 Atl. Rep. 330.

231. WILL—Estoppel.—Where a person, before reaching majority, receives from the nominated executor of a paper purporting to be a will land thereby devised to her for life, remains in possession of the land for a considerable period after becoming of age, accepting and acquiescing in the validity of certain probate proceedings, whereby the paper has been adjudged to be the true last will and testament of the alleged testator, and also recognizing the paper itself as such will, and claiming thereunder a life estate only, a subsequent judgment creditor of such person is conclusively estopped from denying the validity of the paper as a will, or questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings, and also from asserting that the debtor has any greater interest in the land than a life estate.—BRANSON v. WATKINS, Ga., 23 S. E. Rep. 204.

232. WILLS—Sale of Land by Executor.—In an action for specific performance of a contract for the purchase of land from the executors, the defense of unmerchantableness of title in that, under the statute, the will was void, and no power of sale conferred on the executors, cannot prevail where the statute is so clear as to leave no doubt of its construction in favor of the validity of the will and of the power.—LEPPINCOTT v. WIKOFF, N. J., 33 Atl. Rep. 305.

233. WILL—Trusts.—A testator stated in his will that he intended to have all his land ultimately divided equally between his nine children, and that in part execution of this plan he had deeded one tract to his daughter and two tracts to two of his sons. The will contained no devise to the daughter, and did not expressly devise to any one the tract described as having been deeded to her. He had in fact deeded this tract to her, but she had afterwards reconveyed it to him, without consideration, at his request: Held, that said tract descended as intestate estate.—STODDER v. HOFFMAN, Ill., 41 N. E. Rep. 1082.

234. WITNESS—Conversation with Decedent.—Code, § 590, excluding the testimony, in his own behalf, of a party interested in a suit, concerning a personal transaction between the witness and a deceased person, as against the personal representative then defending or prosecuting the suit, does not exclude the testimony of defendant as to a conversation with a decedent and two other persons who were associated with decedent in the transaction which is the subject of a suit, in which the personal representative of the decedent and such other persons were coplaintiffs.—JOHNSON v. TOWNSEND, N. Car., 23 S. E. Rep. 271.

235. WITNESS—Transaction with Decedent.—Neither a sheriff who has levied a writ of attachment upon chattels nor the attachment creditor is an "assignee" of the attachment debtor within the meaning of section 322 of the Code of Civil Procedure; and a vendee of such attachment debtor, although a party to the action, may testify in his own behalf to the transaction whereby he claims title from the attachment debtor, who has died in the meantime.—BURLINGTON NAT. BANK v. BEARD, Kan., 42 Pac. Rep. 320.